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Wilful Ignorance and Criminal Culpability

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Article

Wilful Ignorance and Criminal Culpability

Robin Charlow*

I.	Introduction	1352
II.	The Problem with Current Practice	1358
	A. <i>Uses of Wilful Ignorance in Criminal Law</i>	1358
	B. <i>Defining Wilful Ignorance</i>	1366
	C. <i>Defining Knowledge and Recklessness</i>	1372
	D. <i>Comparing Knowledge and Recklessness</i>	1380
	E. <i>Comparing Definitions of Wilful Ignorance with</i> <i>Definitions of Knowledge and Recklessness</i>	1382
	1. <i>Code-Based Definitions</i>	1382
	2. <i>Recklessness-Based Definitions</i>	1387
	3. <i>Wilfulness-Based Definitions</i>	1388
	F. <i>Limits of Definitional Analysis</i>	1390
III.	Comparative Culpability	1391
	A. <i>The Culpability of Purposefulness, Knowledge, and</i> <i>Recklessness</i>	1391
	B. <i>The Culpability of Code-Based Wilful Ignorance</i>	1395
	C. <i>The Culpability of Recklessness-Based Wilful</i> <i>Ignorance</i>	1397

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	<i>D. The Culpability of Wilfulness-Based Wilful Ignorance</i>	1397
IV.	Historical Indicators of Added Culpability	1400
	<i>A. Connivance Cases</i>	1402
	<i>B. Duty-to-Know Cases</i>	1403
	<i>C. Obstructionist-Purpose Cases</i>	1410
V.	A Suggested Definition of Wilful Ignorance	1413
VI.	A Case Study: Drug Importation	1418
	<i>A. Jury Misunderstanding</i>	1419
	<i>B. Culpability in Context</i>	1423
VII.	Conclusion	1429

I. Introduction

Human frailties being what they are, rarely a week goes by without newspaper accounts of various incidents implicating the notion of wilful ignorance.¹ From officers of financial institutions professing ignorance of conditions leading to the recent savings and loan debacle,² to CIA Director Robert Gates disclaiming knowledge of the Iran-Contra arms diversion

1. Many different terms denote the concept of wilful ignorance, including connivance, wilful blindness, conscious avoidance, avoidance of any endeavor to know, conscious purpose to avoid learning the truth, deliberate ignorance, deliberately avoiding knowing, deliberately choosing not to learn, purposely abstaining from all inquiry, studied ignorance, wilful shutting of the eyes, deliberately omitting to make further inquiries, and knowledge of the second degree. *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 867 (3d ed. 1982); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 57, at 157 (2d ed. 1961); J. LI. J. Edwards, *The Criminal Degrees of Knowledge*, 17 *MOD. L. REV.* 294, 301 (1954); Rollin M. Perkins, "Knowledge" as a *Mens Rea* Requirement, 29 *HASTINGS L.J.* 953, 956-57 (1978); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 *J. CRIM. L. & CRIMINOLOGY* 191, 191 n.3 (1990); Benita F. Berkowitz, Comment, *Conscious Avoidance of Knowledge: A Balanced Jury Charge Reinforces the Subjective Standard*, 45 *BROOK. L. REV.* 1083, 1083 (1979).

2. One example is Charles Keating, former chief of the parent company of Lincoln Savings and Loan of Irvine, California. After Lincoln incurred a record-breaking \$2.5 billion loss when it collapsed in 1989, Keating argued in his defense to charges of bond-marketing fraud that he did not control what individual salespersons told Lincoln customers who purchased bonds; "he merely followed the advice of the best lawyers and accountants in structuring the deals." Don J. DeBenedictis, *Keating's Legal Woes Mount: Convicted S&L Chief Faces Another Prosecution, Myriad Civil Suits*, *A.B.A. J.*, Feb. 1992, at 30, 30.

For a discussion of the use of wilful ignorance in determining the liability of financial institutions for violations of certain reporting requirements, see Jonathan J. Rusch, *Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act*, 37 *CATH. U. L. REV.* 465, 481 (1988). Rusch observes that the Department of the Treasury's regulations implementing the Bank Secrecy Act explicitly incorporate the criminal law doctrine of wilful ignorance: "If a financial institution suspects someone may be structuring transactions in order to avoid the filling out of a record or report, but deliberately refuses to ask questions because it wishes to remain ignorant and therefore, 'innocent,' the financial institution will be deemed to have knowledge for purposes of assessing liability under the Bank Secrecy Act." *Id.* (quoting Amendments to Implementing Regulations Under the Bank Secrecy Act, 52 *Fed. Reg.* 11436, 11437 (1987)).

scheme despite the enlightenment of all those around him,³ to parents claiming to be unaware of any child abuse when their children are visibly bruised or sexually disturbed,⁴ individuals who supposedly failed to see the obvious appear in a seemingly endless array of stories. Public cries for condemnation in such instances often stem from outright disbelief in the subjects' avowed ignorance. But even if we accept that some individuals were truly unaware, we may feel that retribution is nevertheless warranted because the actors are just as morally reprobate as if they had actually known. Yet, despite the rapidly expanding instances in which we criminally punish those who act in deliberate ignorance, and despite the use of wilful ignorance as a criminal mens rea for over 100 years, there is tremendous confusion in this area of law and a lurking sense that something is fundamentally awry.⁵

Wilful ignorance is employed in criminal law primarily, and most controversially, as a mental state that satisfies a required mens rea of knowledge.⁶ The practice of considering wilful ignorance a form of, or a substitute for, knowledge first appeared in and has evolved almost exclusively through case law, with little or no critical analysis.⁷ Courts

3. See *A Wink and a Nod for Gates*, BOSTON GLOBE, Nov. 5, 1991 (Editorial), at 18, available in LEXIS, Nexis Library, BLOBE File ("A man with a legendary memory, Gates seemed afflicted with amnesia at [his confirmation] hearings, which produced strong indications that he helped cover up the Iran-contra scandal by, at the least, remaining willfully ignorant."); see also *infra* note 272 (discussing President Reagan's "plausible deniability" concerning the Iran-Contra affair).

4. See *In re S.D.*, 581 N.E.2d 158, 162 (Ill. App. 1991) (finding that a mother had "turned her back" on the apparent sexual abuse of her two-year-old daughter by the child's stepfather rather than taking steps to confirm the suspected abuse), *appeal denied*, 587 N.E.2d 1016 (Ill. 1992).

5. See, e.g., *Tomala v. United States*, 112 S. Ct. 1997, 1998 (1992), *denying cert.* to 946 F.2d 883 (2d Cir. 1991), (White, J., dissenting) (protesting that in a criminal case in which a conviction turns on the significance of wilful ignorance, "the outcome . . . should not depend on the circuit in which the case is tried").

6. Civil cases also have long equated wilful ignorance with knowledge. See, e.g., *Mackey v. Fullerton*, 4 P. 1198, 1200 (Colo. 1884) ("Willful ignorance is equivalent, in law, to actual knowledge.").

7. Courts originally approved of wilful ignorance for very limited purposes. See, e.g., *Spurr v. United States*, 174 U.S. 728 (1899) (approving a jury instruction that wilful ignorance of a fact satisfies a mens rea of knowledge when there is a specific statutory duty to ascertain the fact); *People v. Brown*, 16 P. 1 (Cal. 1887) (using wilful ignorance to infer actual knowledge); *Bosley v. Davies*, 1 Q.B.D. 84 (1875) (holding that wilful ignorance satisfies the mens rea of "suffering" illegal activity). These early rulings were then cited as authority for more expansive uses of the doctrine, even though their rationales no longer applied. See, e.g., *Griego v. United States*, 298 F.2d 845, 849 (10th Cir. 1962) (relying on *Spurr* to equate wilful ignorance with knowledge in a drug importation case, although there was no specific statutory or implied duty to ascertain the fact of illegal drug importation); *United States v. Erie R.R.*, 222 F. 444, 449-50 (D.N.J. 1915) (citing *Spurr* as authority for ruling that a carrier may be guilty of "knowingly" granting an unlawful concession in rates if it was wilfully ignorant of facts that made the rate unlawful, though no similar statutory duty to ascertain the fact existed); see also *United States v. Jewell*, 532 F.2d 697, 705-06 & nn.4, 9 (9th Cir.) (en banc) (Kennedy, J., dissenting) (noting that modern uses of wilful ignorance as a substitute for knowledge originated with the old English "connivance" cases such as *Bosley*, which were situation specific, and with cases like *Spurr*, which are significantly distinguishable), *cert. denied*, 426 U.S. 951 (1976). In this way, wilful

now routinely read wilful ignorance—in all its various and sundry formulations⁸—into statutes requiring knowledge, and they usually do so without any attempt to justify the practice as an exercise in statutory interpretation or a search for legislative intent.⁹

ignorance quickly moved from an essentially recklessness-type mens rea, *see infra* subpart II(A) (discussing connivance cases), to something that could satisfy a mens rea of knowledge in a few particular types of cases, *see infra* subpart IV(B) (discussing duty-to-know cases), to its present status as a wholesale knowledge substitute, *see, e.g.*, *United States v. Nicholson*, 677 F.2d 706, 710 (9th Cir. 1982) (upholding a jury instruction that “[d]eliberate avoidance of . . . knowledge is the equivalent of actual knowledge”). Yet wilful ignorance was adopted as a knowledge equivalent without any meaningful analysis of the relative culpability of the two mental states in the increasing instances in which they were equated. The problem was not that serious for many years apparently because wilful ignorance was not widely employed, but the problem has become more acute in the last two decades as the volume and scope of cases in which the doctrine is used grows rapidly. *See United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985) (describing the expansion of the types of cases in which the Ninth Circuit has authorized the use of wilful ignorance instructions, beginning with importation of controlled substances and extending to theft of government property, securities fraud, and concealment of an escaped prisoner).

8. Existing problems in the use of wilful ignorance in criminal law are exacerbated by the numerous different formulations used to describe the concept. *See* Kristen L. Chesnut, Comment, *United States v. Alvarado: Reflections on a Jewell*, 19 GOLDEN GATE U. L. REV. 47, 49 (1989) (describing how “the usefulness of the [wilful ignorance] instruction is impaired by occasional inappropriate use and confusion generated by disparate forms of the instruction in federal courts”). These varied definitions are the result of the ad hoc fashion in which the doctrine evolved from court rulings in England and the United States. Since the concept of wilful ignorance was not contained in any statute or treatise, the notion of precisely what constitutes wilful ignorance was never clearly delineated. Further, issues related to wilful ignorance usually arose in challenges to jury instructions, and that context raises a host of analytical difficulties. *Cf. United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir.) (noting that it is difficult to use a conventional definition or ALI language as a jury charge because “a good definition, like the language of a sound judicial opinion, is not necessarily appropriate as a charge” (citations omitted)), *cert. denied*, 414 U.S. 821 (1973); *United States v. Lanza*, 790 F.2d 1015, 1023-24 (2d Cir.) (criticizing the indiscriminate use of the Model Penal Code definition of wilful ignorance as a jury charge), *cert. denied*, 479 U.S. 861 (1986). Appellate courts would approve or disapprove of particular jury instructions that mentioned wilful ignorance and would occasionally criticize some specific word used in a charge, but they provided no meaningful guidance to lower courts, basically leaving them to adopt whatever language trial judges preferred. As a result, trial courts use many different definitions to describe the concept to jurors—ranging from descriptions of negligence, *see infra* note 64, to descriptions of a mental state more culpable than recklessness, *see* discussion *infra* subpart II(B). Some of these descriptions are quite muddled, *see, e.g.*, *United States v. Precision Medical Lab., Inc.*, 593 F.2d 434, 445 n.11 (2d Cir. 1978) (approving an instruction that knowledge may be inferred if the defendant “acted with a ‘deliberate disregard’ of the truth,” and that “an act could be done wilfully, knowingly and unlawfully, if it is done recklessly . . . without regard to whether it was true or false”), others internally inconsistent, *see, e.g.*, *United States v. Natelli*, 527 F.2d 311, 322 n.9 (2d Cir. 1975) (noting that “reckless deliberate indifference” to the truth permits the inference of a wilful and knowing violation), *cert. denied*, 425 U.S. 934 (1976); *United States v. Squires*, 440 F.2d 859, 864 (2d Cir. 1971) (finding the trial court’s wilful ignorance charge “internally inconsistent”), and many likely incomprehensible to the laymen who must apply them, *see United States v. Ramsey*, 785 F.2d 184, 190 (7th Cir.) (criticizing the model instruction from the circuit manual as “opaque and unhelpful to jurors,” and noting the importance of providing instructions “that do not require scholastic glossators to impart meaning”), *cert. denied*, 476 U.S. 1186 (1986); *United States v. Burns*, 683 F.2d 1056, 1061 (7th Cir. 1982) (referring to the “accepted” instructions as “opaque,” yet consistent with due process), *cert. denied*, 459 U.S. 1173 (1983).

9. Some, notably Justice Antonin Scalia, question the legitimacy of resorting to legislative history

Recent criticism of this judicial policy focuses on the different composition of these two states of mind. Knowledge and wilful ignorance, it is argued, are simply not the same thing.¹⁰ Therefore, wilful ignorance cannot be used legitimately, or constitutionally,¹¹ in place of statutorily

to determine statutory meaning. In Scalia's view, committee reports and quotations from the Congressional Record are not authoritative sources for the proper construction of an enactment. For example, in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991) (Scalia, J., concurring), he argued that committee reports are unreliable indicators of both congressional intent and the meaning of a statute and concluded that "we are a Government of laws not of committee reports." *Id.* at 2490. He contends that historically the Court has rejected "utilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text." *Id.*; see also *id.* ("[D]ebates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." (quoting *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897))). Justice Scalia's thesis is not the prevalent view. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (arguing that legislative history is useful in statutory interpretation, that the arguments against its use merely provide reasons for careful application rather than total abandonment of legislative history, and that changing the extent to which it is used would be harmful). Hence, even a search for legislative intent might add some needed support for the present use of wilful ignorance as a means of fulfilling a statutory requirement of knowledge.

10. See, e.g., Robbins, *supra* note 1, at 220-27 (asserting that wilful ignorance is merely recklessness and not knowledge); Comment, *Wilful Blindness as a Substitute for Criminal Knowledge*, 63 IOWA L. REV. 466, 473 (1977) (noting that wilful ignorance requires having suspicion, and "[s]uspicion implies a lack of, rather than a presence of, knowledge").

11. Several writers contend that the use of wilful ignorance to meet a statutory requirement of knowledge is not only inadvisable, but also unconstitutional. See, e.g., Robbins, *supra* note 1, at 194-95, 231-32; Comment, *supra* note 10, at 466-67, 472-73. Their position is twofold. First, under separation-of-powers principles, legislatures, not courts, make law. If a legislature defines a crime to require knowledge of a certain fact, a court cannot substitute a different mens rea for the required knowledge. Therefore, courts are acting unconstitutionally when they permit a mental state (wilful ignorance) that is different from the one specified in a statute (knowledge) to be used to fulfill the statutorily required mens rea. Cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[T]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating component contemplated by the words used in the statute." (footnote omitted)); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) ("[I]t is the legislature, not the Court, which is to define a crime. . . . It would be dangerous, indeed, . . . to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."); *Jewell*, 532 F.2d at 706 (Kennedy, J., dissenting) ("When a statute specifically requires knowledge as an element of a crime . . . the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy." (footnote omitted)); *State v. Pickus*, 257 N.W. 284, 295-96 (S.D. 1934) ("[If a defendant] is to be criminally held it must be by legislative act and not by judicial decision."). Second, due process requires that each element of a crime be proved beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Christoffel v. United States*, 338 U.S. 84, 89 (1949) (stating that all elements of a crime must be proved beyond a reasonable doubt). Hence, if knowledge is an element of a crime and something that is not knowledge (wilful ignorance) is proved instead of knowledge, a defendant will not have been convicted of every element of the crime with which he is charged, in violation of due process of law.

These constitutional arguments are dependent on the premise that the term "knowledge," as used in criminal statutes, could not comprise wilful ignorance. Three factors militate against this premise. First, "knowledge" is an ambiguous term, not having one fixed or limited meaning, see *infra*

required knowledge. One modern thesis maintains that wilful ignorance is more like recklessness than knowledge, and it proposes that wilful ignorance be equated with recklessness in legislation.¹²

Criticism of the widespread use of wilful ignorance to satisfy a required *mens rea* of knowledge is welcome and long overdue. But these early attempts to address the issue are internally deficient and ultimately misdirected. Some are inadequate in part because they do not take into account the many different ways that wilful ignorance is described. All fail

subpart II(C), thus rendering the term open to judicial construction. See NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.02, at 7 (5th ed. 1992) (maintaining that when a statute's meaning is ambiguous "[i]t is then the function of the court to make the referent clear or as clear as possible from the information and evidence which is presented to it" (footnote omitted)); cf. *Wiltberger*, 18 U.S. (5 Wheat.) at 95-96 ("The intention of the legislature is to be collected from the words they [sic] employ. Where there is no ambiguity in the words, there is no room for construction."). Hence, courts are acting within their proper constitutional role in construing the ambiguous term "knowledge" to include the concept of wilful ignorance. Second, wilful ignorance is not entirely unlike our general understanding of what constitutes knowledge, see *infra* subpart II(E), so courts construing the meaning of the term "knowledge" might not be clearly unreasonable in including wilful ignorance. See *Jewell*, 532 F.2d at 700 (indicating that the "textual justification" for deeming wilful ignorance to be knowledge "is that in common understanding one 'knows' facts of which he is less than absolutely certain. To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question."). But see GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 126 (2d ed. 1983) ("The courts ought not to extend a *mens rea* word by forced construction. If, when Parliament says 'knowing' or 'knowingly,' it does not mean actual knowledge, it should be left to say as much by amending the statute."); *Jewell*, 532 F.2d at 706 (Kennedy, J., dissenting) (indicating that even if wilful ignorance and knowledge are equally blameworthy, since wilful ignorance is "a state of mind distinct from" knowledge, a court may not substitute the former for the latter when the latter is specified by statute). Third, and most importantly, when legislatures inserted the term "knowledge" in criminal codifications they may be presumed to have known of and to have adopted the prior common-law practice of using wilful ignorance, at least in some instances, see *infra* Part IV, to satisfy a requirement of knowledge. See *Jewell*, 532 F.2d at 703-04 (arguing that wilful ignorance had historically been employed in criminal cases to satisfy a statutory requirement of knowledge, so that when Congress used the term "knowingly" in the Drug Control Act it "is presumed to have known and adopted" this prior usage); see also *Morissette*, 342 U.S. at 263 ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken . . ."); *United States v. Sarantos*, 455 F.2d 877, 881 (2d Cir. 1972) (observing that construing "'knowingly' in a criminal statute to include wilful blindness to the existence of a fact is no radical concept in the law"). Thus, there are several significant weaknesses in the constitutional argument.

Moreover, even if a constitutional infirmity exists, it could be remedied easily by legislative fiat, that is, by adding a single statute to the relevant penal codification which, like Model Penal Code § 2.02(7) (all citations are to the Official Draft and Revised Comments 1985), simply decrees that whenever "knowledge" is specified as the required *mens rea* for a crime, wilful ignorance (defined in any way the legislature desires) will suffice. Such action would not be advisable, however, for reasons discussed throughout this Article.

12. See Robbins, *supra* note 1, at 195-96, 232-34. At least one earlier writer also argued that wilful ignorance is very similar to recklessness. See Edwards, *supra* note 1, at 303-05 (referring to "a close affinity" between wilful ignorance and recklessness, "the similarity of mind characterising both recklessness and [wilful ignorance]," "the synonymous nature" of wilful ignorance and recklessness, and the fact that wilful ignorance "is indistinguishable from recklessness"). But cf. WILLIAMS, *supra* note 1, § 57, at 159 (noting that wilful ignorance is "not quite the same thing" as recklessness).

to explore in sufficient detail the similarities and differences between knowledge, recklessness, and the varied forms of wilful ignorance. Thus, conclusions as to the equivalence or inequivalence of knowledge, recklessness, and wilful ignorance have not been suitably substantiated.

More importantly, these early critiques do not focus on the fundamental, underlying issue. There has been a glaring absence of adequate investigation into the *culpability* of wilfully ignorant behavior relative to that of knowing behavior.¹³ The recent debate over wilful ignorance has not progressed much beyond the superficial manifestation of the problem—the definitional differences between knowledge and wilful ignorance—to the core of the issue: whether wilful ignorance, however defined, is always, or ever, as blameworthy as knowledge.¹⁴ This latter consideration is what really matters, for we want to punish wilful ignorance as knowledge only if and when the two are comparably morally reprehensible.¹⁵ Therefore, this Article attempts to turn the analysis of wilful ignorance toward a new and different inquiry: what behavior or state of mind is it that society wishes to punish under the rubric of wilful ignorance, and how blameworthy is that state of mind? Only after answering these questions ought we decide how to define wilful ignorance and where to place it in the hierarchy of criminal *mens rea*.¹⁶

Part II explores, in the traditional way, the problem of treating wilful ignorance as included within the term “knowledge.” It categorizes current definitions of wilful ignorance and discusses whether any of these definitions describe a state of mind sufficiently like our common understanding of knowledge to be considered a form of knowledge. Part II concludes that most currently used formulations of wilful ignorance delineate a hybrid mental state that falls somewhere between knowledge and recklessness, but that is significantly not like knowledge.

Part III addresses the more fundamental issue of whether wilful ignorance *ought* to be equated with knowledge; the analysis hinges on

13. Professor Robbins, for example, touches on the issue of culpability in a footnote at the end of his article. See Robbins, *supra* note 1, at 233-34 n.265.

14. Many believe that moral culpability is essential to criminality or to criminal punishment. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 36 (1968); cf. JEROME HALL, PRINCIPLES OF CRIMINAL LAW 93 (2d ed. 1947) (describing moral culpability as personal guilt that “includes both *mens rea* and motivation”).

15. Comparing the culpability of wilful ignorance with that of knowledge is complicated by the fact that wilful ignorance appears in a myriad of different formulations. See *infra* subpart II(B). Thus, determining the relative blameworthiness of wilful ignorance and knowledge will require comparison of the culpability of knowledge with the culpability of the various different forms of or components used to describe wilful ignorance. See *infra* subparts III(B)-(D).

16. Although we generally think of criminal *mens rea* as forming a continuum from a less culpable state (negligence) to a more culpable state (intent), they do not necessarily fall neatly into a rigid hierarchy of blameworthiness that is consistent for all crimes or even for the same crime under all circumstances. See *infra* Part III.

whether any definition of the doctrine describes a state that is usually as culpable as knowledge. This Part compares the culpability of several traditional criminal mens rea with each of the different categories of wilful ignorance and concludes that no current formulation of wilful ignorance describes a state that is usually as reprehensible as knowledge.

Part IV surveys criminal law references to wilful ignorance going back over 100 years, and it identifies several recurring patterns. Each pattern isolates a factor that raises the level of culpability of wilfully ignorant behavior, though no single factor alone renders wilful ignorance as culpable as knowledge in all instances.

In Part V, characteristics of the special culpability factors distinguished in Part IV are used as the basis for a suggested definition of wilful ignorance. One of these enhanced culpability factors—a purpose to avoid criminal punishment by deliberately engineering one's own ignorance—is coupled with several elements of wilful ignorance discussed earlier in the Article. The resulting construct, though still not knowledge, more closely approximates the culpability of knowledge and may be adopted as an appropriate mens rea for crimes that currently require knowledge.

Part VI illustrates the practical significance of the principles discussed in the previous sections by applying them to a leading drug importation case, *United States v. Jewell*,¹⁷ in which wilful ignorance was at issue.

II. The Problem with Current Practice

Whenever a criminal statute requires that a culpable individual know some material fact, courts currently allow a finding of knowledge if the prosecution proves that the individual was deliberately ignorant of the fact. This Part establishes that none of the various formulations of wilful ignorance currently in vogue describes a mental state quite like what we generally understand to be "knowledge." Thus, the present practice of using wilful ignorance to fulfil a statutory requirement of knowledge is problematic.

A. Uses of Wilful Ignorance in Criminal Law

However it may be defined, wilful ignorance is used in three different ways in criminal cases. First, it is sometimes, though infrequently, used as evidence from which a jury may draw an inference of actual knowledge when knowledge is the mens rea required for the commission of a particular crime.¹⁸ Jurors are instructed that if they find evidence

17. 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).

18. See *United States v. Alvarado*, 838 F.2d 311, 315 (9th Cir.) (noting that it may be appropriate

that a defendant consciously or deliberately avoided finding out the truth of some material fact, they may infer from that behavior, as well as from other facts in the case, that the defendant really did have the required knowledge that the fact was true. For example, in *People v. Brown*,¹⁹ one of the earliest American criminal law cases to refer to wilful ignorance, the doctrine was not considered a mens rea in its own right; instead, evidence of wilful ignorance was said to supply proof of actual knowledge.²⁰

At first glance, it seems odd to assert that proof that one deliberately avoids knowing can be proof that one knows. The proposition is not that strange, however, when one considers what usually constitutes proof of knowledge in a criminal case. There is rarely direct evidence of knowledge,²¹ such as an admission by the defendant.²² Knowledge is usually proved instead by circumstantial evidence,²³ such as evidence that the

to instruct the jury that "knowledge may be satisfied by inferences drawn from proof that a defendant deliberately . . . closed his eyes to what would otherwise have been obvious to him"), *cert. denied*, 487 U.S. 1222 (1988); *United States v. Martin*, 773 F.2d 579, 584 (4th Cir. 1985) ("[K]nowledge of a fact may be inferred from . . . willful blindness to the existence of a certain fact."); *United States v. Garzon*, 688 F.2d 607, 609 n.3 (9th Cir. 1982) ("Defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact."); *United States v. Brawer*, 482 F.2d 117, 128 n.14 (2d Cir. 1973) (endorsing a trial court instruction that allowed the jury to draw an "inference of the existence of knowledge from evidence of wilful ignorance"), *cert. denied*, 419 U.S. 1051 (1974); *People v. Brown*, 16 P. 1, 3 (Cal. 1887) (holding that knowledge may be inferred when the defendant "suspected the fact, and abstained from inquiry lest he should know"); *see also* *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.) ("If a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge."), *cert. denied*, 476 U.S. 1186 (1986).

19. 16 P. 1 (Cal. 1887).

20. *See id.* at 3. In discussing the requirement (not present in *Brown* itself) that a guilty receiver of stolen goods must know the goods are stolen, the California Supreme Court said:

If a case could arise, however, in which it should appear that [the defendant] suspected the fact, and abstained from inquiry lest he should know, knowledge might be inferred. One must have some knowledge of the fact before he can close his eyes lest he may know. . . . I admit the relevancy of proof of opportunity as bearing upon the issue of actual knowledge. But there must be such actual knowledge, and facts which would ordinarily suggest inquiry are not sufficient.

Id. This excerpt suggests not that wilful ignorance can be an alternative to knowledge, but that a jury might infer that the defendant had actual knowledge from facts establishing wilful ignorance.

21. *See, e.g.,* *Grant Bros. Constr. Co. v. United States*, 114 P. 955, 959 (Ariz. 1911) (noting that direct evidence of the defendant construction company's knowledge that it had been hiring illegal aliens was not obtainable), *aff'd*, 232 U.S. 647 (1914).

22. *See* *Rumely v. United States*, 293 F. 532, 560 (2d Cir.) (observing that knowledge must often be proven by inference "because knowledge, being a mental condition, undisclosed, cannot always be proven by direct or express testimony"), *cert. denied*, 263 U.S. 713 (1923).

23. *See* *United States v. Moser*, 509 F.2d 1089, 1092 (7th Cir. 1975) ("Knowledge and intent . . . must ordinarily 'largely be proved by circumstantial evidence.'" (quoting *Jackson v. United States*, 330 F.2d 679, 681 (8th Cir.), *cert. denied*, 379 U.S. 855 (1964))); *State v. Pickus*, 257 N.W. 284, 295 (S.D. 1934) ("[E]vidence [of knowledge] in every case will of necessity be largely circumstantial."); *cf.* *United States v. Bright*, 517 F.2d 584, 587 (2d Cir. 1975) (noting that circumstantial evidence may

defendant had the means to know²⁴ or acted as though he knew.²⁵ Very frequently, the only such proof is evidence that the circumstances were such that a reasonable person in the defendant's position would have known.²⁶ In other words, although knowledge requires a subjective state of awareness,²⁷ proof that an objective standard would be satisfied—that the defendant should have known because a reasonable person in the circumstances would have known—is often the only evidence of actual knowledge.

A case that contains evidence of wilful ignorance will usually also contain circumstantial evidence that a reasonable person would have known. From such evidence the jury may infer that the particular defendant knew. Similarly, proof that a defendant appeared deliberately to avoid knowledge could be circumstantial evidence from which to infer that the defendant really did know but pretended not to know.²⁸ This evidentiary use of wilful ignorance is not the subject of this Article and will not be explored in greater depth.

Second, wilful ignorance is sometimes used to satisfy a required mens rea that is different from, and less demanding than, knowledge. Some of the earliest references to the doctrine appear in old English cases in which "suffering," or permitting, some undesirable act to occur was made a criminal offense. As will be explained, knowledge of the prohibited act was probably not required in these instances.²⁹ In similar fashion, wilful ignorance has sometimes been used to satisfy the mens rea of recklessness,³⁰ and even of negligence.³¹ This second function of the

suffice to prove that defendant knew the goods were stolen).

24. See *Pickus*, 257 N.W. at 297 ("[K]nowledge may . . . be proven by circumstances, including the opportunities which the accused had to ascertain the facts.").

25. See *United States v. Sheiner*, 410 F.2d 337, 340 (2d Cir.) (stating that "[k]nowledge in the mind of [the defendant] . . . may be inferred or gathered from the outward manifestations, by the words or acts" of the defendant (quoting *Anderson v. United States*, 270 F.2d 124, 127 (6th Cir. 1959))), cert. denied, 396 U.S. 825 (1969).

26. See, e.g., *United States v. Werner*, 160 F.2d 438, 441-42 (2d Cir. 1947) ("[T]he fact that a reasonable man would have thought that [the goods] had been stolen, is some basis for finding that the accused actually did think so."); WILLIAMS, *supra* note 11, at 124 ("[I]f any ordinary person would have known a fact, the jury may infer that the defendant knew it, simply because they [sic] cannot believe that he did not, in the circumstances, know it.").

27. See *infra* subpart II(C).

28. See *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990) ("The purpose of the deliberate ignorance instruction is to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge. '[T]he instruction is nothing more than a refined circumstantial evidence instruction properly tailored to the facts of a case . . .'" (quoting *United States v. Manriquez Arbizu*, 833 F.2d 244, 248 (10th Cir. 1987))); see also *infra* subpart IV(A) (discussing the connivance cases, which sometimes deal with pretended ignorance).

29. See *infra* notes 33-62.

30. See *infra* subpart II(E).

31. See *infra* note 64.

doctrine is not usually controversial, for reasons outlined below, and also will not be the central focus of this Article.

Third, and most often, wilful ignorance is used to satisfy the mens rea of knowledge. This typical application gives rise to most of the controversy over the doctrine in the area of criminal law³² and is the subject of this Article.

All three uses of the concept of wilful ignorance ("wilful blindness" as the English call it³³) are illustrated by the examination of a group of English decisions that I will refer to as the "connivance" or "licensee" cases.³⁴ The concept of wilful ignorance or wilful blindness as "connivance" appeared very early in a series of English gambling prosecutions,³⁵ and the terms "connivance" and "wilful blindness" came to be used interchangeably in English criminal law.³⁶ In each of these cases, an innkeeper was charged with "suffering" gaming on his or her premises in violation of the Intoxicating Liquors (Licensing) Act of 1872,³⁷ and a question arose as to the necessary mens rea to support a conviction for "suffering."³⁸

In the first case, *Bosley v. Davies*,³⁹ the court ruled that "actual knowledge in the sense of seeing or hearing"⁴⁰ by the party charged is not

32. The controversy centers around whether wilful ignorance, however described, is definitionally equivalent to knowledge or whether it is more like some other mental state, such as recklessness. See, e.g., MODEL PENAL CODE § 2.02(7) cmt. 9 ("Whether such cases should be viewed as instances of acting recklessly or knowingly presents a subtle but important question."); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 219 (2d ed. 1986) (citing and discussing Model Penal Code § 2.02(7) cmt. 9); WILLIAMS, *supra* note 1, § 57, at 159 (noting the instability of the rule equating wilful ignorance and knowledge); Edwards, *supra* note 1, at 298 (asserting that wilful ignorance approximates recklessness); Robbins, *supra* note 1, at 234 (concluding that the mens rea required by wilful ignorance most closely resembles recklessness).

33. See Edwards, *supra* note 1, at 306.

34. These cases are important not only to illustrate different uses of wilful ignorance in criminal law, but also because they highlight one factor that increases the culpability of wilfully ignorant behavior. See *infra* subpart IV(A).

35. E.g., *Somerset v. Hart*, 12 Q.B.D. 360 (1884) (Lord Coleridge, C.J.); *Redgate v. Haynes*, 1 Q.B.D. 89 (1876) (Blackburn, J.); *Bosley v. Davies*, 1 Q.B.D. 84 (1875) (Cockburn, C.J., Mellor and Quain, JJ.).

36. See Edwards, *supra* note 1, at 301 (noting that by 1900 "the concept of connivance or wilful blindness had become firmly embedded in the minds of the [English] judges" (emphasis added)). Though connivance and wilful blindness are used interchangeably, there are at least two different ways to understand the term connivance as used in these cases: first, as pretended ignorance, and, second, as suspicion of a fact coupled with deliberate avoidance of positive knowledge for the purpose of fostering or permitting illegal activity. See *infra* text accompanying notes 48-54. Neither of these understandings of connivance corresponds precisely with the general understanding of wilful ignorance developed in nonconnivance cases. See *infra* subpart II(B).

37. 35 & 36 Vict., ch. 94, § 17; see *Somerset*, 12 Q.B.D. at 360; *Redgate*, 1 Q.B.D. at 89; *Bosley*, 1 Q.B.D. at 85.

38. See *Somerset*, 12 Q.B.D. at 361-62; *Redgate*, 1 Q.B.D. at 92-93; *Bosley*, 1 Q.B.D. at 87.

39. 1 Q.B.D. 84 (1875) (Cockburn, C.J., Mellor and Quain, JJ.).

40. Perkins and Boyce argue that there are several kinds of criminal knowledge, among these

necessary, but . . . there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on."⁴¹ In the second case, *Redgate v. Haynes*,⁴² Justice Blackburn reasoned that "suffering" did not create a negligent or strict liability offense,⁴³ but "if [the innkeeper] purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, . . . this would be enough to make her liable."⁴⁴ Justice Lush agreed that "it is not necessary that actual knowledge of the gaming should be proved. . . . [C]onnivance on the part of the landlady or the person in charge would be quite sufficient."⁴⁵ Finally, in *Somerset v. Hart*,⁴⁶ the court ruled that "where no actual knowledge is shewn there must . . . be something to shew . . . that there was something like connivance on [the landlord's] part, that he might have known but purposely abstained from knowing."⁴⁷

The connivance cases may be understood in several different ways. First, "connivance" in these cases might mean that the innkeeper actually knew gambling was taking place on his premises but pretended not to know. This interpretation accords with common definitions of the term "connivance." The dictionary defines "connivance" as "*knowledge of and active or passive consent to wrongdoing*,"⁴⁸ and the verb "to connive" has several meanings:

1: to *pretend ignorance* of or fail to take action against something one ought to oppose 2 a: to be indulgent or in secret sympathy: *WINK* b: to cooperate secretly or *have a secret understanding* 3: CONSPIRE, INTRIGUE.⁴⁹

knowledge that comes from personal observation ("seeing or hearing") and correct belief, both of which might be described as actual knowledge. See PERKINS & BOYCE, *supra* note 1, at 865-67, 870; Perkins, *supra* note 1, at 955-56; see also State v. Perkins, 160 So. 789, 791 (La. 1935) ("Knowledge may mean that which is gained by information or intelligence as well as what is obtained from personal observation.").

41. *Bosley*, 1 Q.B.D. at 88. The court added: "Constructive knowledge will supply the place of actual knowledge." *Id.* It appears that, in this context at that time in history, constructive knowledge meant that the employer was vicariously liable for the mens rea of his or her servant. See *Somerset*, 12 Q.B.D. at 362 ("[K]nowledge of the servant is constructively the knowledge of the master."); Edwards, *supra* note 1, at 299 ("[T]he knowledge or connivance of a servant is attributed to his employer, the governing principle being that the doctrine of vicarious liability applies only in cases where the employer has delegated control and responsibility for the premises to the servant.").

42. 1 Q.B.D. 89 (1875) (Blackburn, J.).

43. See *id.* at 94 ("[T]he mere fact that gaming was carried on on her premises would not render her liable to be convicted . . .").

44. *Id.*

45. *Id.* at 96.

46. 12 Q.B.D. 360 (1884) (Lord Coleridge, C.J.).

47. *Id.* at 364.

48. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 278 (1984) (emphasis added).

49. *Id.* (emphasis added).

Thus, while wilful ignorance or wilful blindness is often described figuratively as closing one's eyes to the truth,⁵⁰ connivance is usually defined, somewhat differently, as winking. When winking, one eye is shut, but the other is still open, taking in everything. The winking metaphor, like most of the definitions of connivance, assumes that the party involved really does know, though he pretends not to know. In this conception of connivance, knowledge exists but is deliberately hidden.⁵¹ If this interpretation of connivance was intended in the licensee cases, the required mental state could have been knowledge, or it could have been some lesser mental state such as suffering, which would be satisfied by the higher state of knowledge. Thus, it may be that when "wilful blindness" was used interchangeably with "connivance" in these early cases, the courts intended to indicate that one who is wilfully ignorant really does know what is going on or is planned, but pretends not to know in order to promote or conspire in illegal activity. Given this interpretation, the licensee cases may be read as rulings that connivance, or wilful ignorance, is a state of mind in which knowledge in fact exists, and that jurors may infer that the required knowledge⁵² exists from evidence of wilful ignorance.

Second, the licensee cases may be understood as rulings that the *mens rea* of "suffering" is broader than that of knowledge and includes a different, and lesser, state of mind called "connivance" or "wilful blindness." Suffering has been interpreted to mean wilfully, intentionally, or deliberately permitting something to occur.⁵³ One may deliberately allow or permit an event to occur without actually knowing whether or not it is occurring. For example, the sufferer might want the activity to occur but be indifferent as to when it might occur, and he might therefore act in such a manner as to allow it to take place at any unspecified time.

It would have made sense for early English courts to choose the term "connivance" to denote this particular non-knowing state of mind in

50. See, e.g., *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.) ("No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate."), *cert. denied*, 476 U.S. 1186 (1986); *United States v. Morales*, 577 F.2d 769, 773 (2d Cir. 1978) ("[T]he defendant had a conscious purpose to avoid enlightenment by closing her eyes to the facts which should have caused her to investigate."); see also *infra* note 57 and accompanying text (discussing how wilful blindness and connivance share the metaphor of closing one's eyes).

51. In addition, it may be that the type of knowledge one possesses in a connivance situation is not personal observation-type knowledge, but rather knowledge in the sense of correct belief. See *supra* note 40.

52. This understanding of connivance or wilful ignorance as pretended ignorance would be viable whether the required mental state for "suffering" was knowledge or something less culpable than knowledge. In either event, actual knowledge, as evidenced by pretended ignorance, would satisfy the necessary *mens rea*.

53. See, e.g., *Zimmerman v. United States*, 1 F.2d 712, 717 (6th Cir. 1924) (holding that to "voluntarily suffer" a prisoner to escape implies "a willful or intentional permission to escape").

criminal cases. In late 19th-century England, "connivance" often appeared in matrimonial law and referred to a party's knowing acquiescence in his spouse's adultery prior to a divorce.⁵⁴ A spouse could not sue for divorce on the basis of adultery if he had known that the adultery was planned or likely and had deliberately consented to it by closing his eyes to it; these grounds were precluded because the spouse was said to have "connived" in the adultery⁵⁵ and thereby to have promoted it.⁵⁶

Thus, the complaining spouse in the divorce cases did not necessarily know that the adultery was taking place at any given moment, just as the innkeeper in the licensee cases may not have known that gambling was occurring on his premises at any particular time, but both parties willingly and even deliberately allowed the illegal acts to occur with their tacit permission. These acts of suffering or indulgence imply that the party had some awareness, short of actual knowledge, of what was planned (adultery or gambling), because the party could not otherwise "connive" in or secretly consent to its occurrence.

Given this understanding of connivance, it is not surprising that wilful ignorance was originally equated with the term. The Latin root of the word "connive" means "to close the eyes" or "to wink."⁵⁷ Consequently, both connivance and wilful blindness share the metaphorical construct of physically closing one's eyes—or figuratively closing one's consciousness—to wrongdoing. To the extent wilful blindness or wilful ignorance meant connivance in this sense, the wilfully ignorant individual deliberately closed himself off from positive knowledge, and he did so intentionally for the wrongful purpose of secretly participating in or promoting an improper or illegal act by another party. Thus, the second possible interpretation of the licensee cases is that connivance, or wilful ignorance, was proof of the required mens rea of suffering, which was a

54. See, e.g., *Boulting v. Boulting*, 164 Rev. Rep. 1302, 1304 (Consistory Ct. 1864) (describing connivance as "an act of the mind" that "implies knowledge and acquiescence"); *Gipps v. Gipps*, 11 Eng. Rep. 1230, 1235 (H.L. 1864) (stating that connivance includes "the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur"); *Rogers v. Rogers*, 162 Rev. Rep. 1079, 1080 (Consistory Ct. 1830) ("Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that [his wife] would be guilty of the crime [of adultery].").

55. See *Gipps*, 11 Eng. Rep. at 1235; *Rogers*, 162 Rev. Rep. at 1080; *Phillips v. Phillips*, 163 Rev. Rep. 993, 998 (Consistory Ct. 1844).

56. See *Stone v. Stone*, 163 Rev. Rep. 978, 979 (Consistory Ct. 1844) ("Facts, to constitute connivance, must have a direct and necessary tendency to cause adultery to be committed or continued.").

57. The Latin "conivere" or "connivere" means "to close the eyes," and the "-nivere" in these terms is akin to the Latin "nictare," which means "to wink." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 278 (1984). But see *supra* note 51 and accompanying text (arguing that closing one's eyes and winking are not exactly the same).

state in which something less than knowledge—suspicion plus deliberate tolerance of illegality—existed.

A third possible interpretation of the licensee cases is that knowledge is the required mental state, because one must know about something in order to suffer it. In this understanding, connivance or wilful ignorance, though still not actual knowledge, would nevertheless satisfy the required mental state of knowledge.⁵⁸ This interpretation seems the least probable, however, since several judges in the licensee cases expressly state that knowledge is not required to establish suffering.⁵⁹

In sum, wilful ignorance as connivance may have meant (1) pretended ignorance, or (2) suspicion of a fact coupled with deliberate avoidance of positive knowledge for the purpose of secretly fostering or permitting illegal activity. The doctrine may have been used in any one of at least three different ways:⁶⁰ (1) if pretended ignorance, as evidence from which to draw an inference that actual knowledge, the required mens rea, exists;⁶¹ (2) if true ignorance, as a mental state that is not positive knowledge but that satisfies a required mens rea of knowledge; or (3) if true ignorance, as proof of a required mental state less than knowledge, such as “suffering.” Whatever was intended in these cases, they have

58. If this interpretation of the cases is accepted, the activity or state of mind comprised by wilful ignorance would be the same as that described earlier, that is, suspicion plus deliberate avoidance of positive knowledge for the purpose of permitting illegal activity to occur. In the licensee cases, the courts were willing to permit a finding of guilt by wilful ignorance only when there was evidence the innkeeper or a managing employee suspected that gambling was to take place, *see, e.g., Redgate v. Haynes*, 1 Q.B.D. 89, 94-95 (1876) (finding that when “people connected with horses” spent the evening together in appellant’s house, she apparently ordered the hall porter to “keep out of the way” lest he observe gambling); *Edwards, supra* note 1, at 299 (noting that the justices in *Redgate* “drew the conclusion that the porter suspected what was going on”), and took intentional, affirmative steps to avoid confirmation in order to allow or permit the illegal activity to occur. *See, e.g., Redgate*, 1 Q.B.D. at 95 (observing that on the innkeeper’s orders, the night porter moved his chair to the end of the house farthest from the room where gambling was occurring); *cf. Bosley v. Davies*, 1 Q.B.D. 84, 88 (1875) (remanding the case for a determination of whether the inn employees knew or connived at patrons’ gambling when evidence suggested that card playing could be heard from the street); *Somerset v. Hart*, 12 Q.B.D. 360, 364 (1884) (finding dismissal of charges proper when there was no evidence that an alehouse owner had reason to suspect or was made aware of gambling going on in another room).

59. *Somerset*, 12 Q.B.D. at 364 (“I do not say that proof of actual knowledge on the part of the landlord is necessary.”); *Redgate*, 1 Q.B.D. at 96 (holding that “it is not necessary that actual knowledge of the gaming should be proved,” as the statute holds liable one who “suffers’ gaming”); *Bosley*, 1 Q.B.D. at 88 (stating that “actual knowledge . . . by the party charged is not necessary”). Although this interpretation of the licensee cases seems the least supportable, the cases are now employed as authority for using wilful ignorance, though it is not knowledge, as a mental state which may satisfy a required mens rea of knowledge. *See supra* note 7.

60. While the licensee cases are employed here to illustrate all three criminal law uses of wilful ignorance, most cases delineate more specifically which one of these three uses is being made of the doctrine.

61. Or, as explained *supra* note 52, wilful ignorance as connivance may have been pretended ignorance and have satisfied a required mental state less demanding than knowledge.

come to stand as authority for the current practice of using wilful ignorance to satisfy a required mens rea of knowledge.⁶² This Article will explore only this use of the doctrine, since it is by far the most common and, at the same time, the least supportable.

B. *Defining Wilful Ignorance*

To determine whether a required mens rea of knowledge ought to include wilful ignorance, it is first necessary to define what is meant by wilful ignorance. Sources abound with differing descriptions of the concept. For purposes of discussion, these may be organized into three groups: definitions based on the Model Penal Code,⁶³ on recklessness, and on wilfulness.⁶⁴ Each of these groups may be further divided into three

62. For example, in 1954 Edwards wrote: "For well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offence based on such words as 'permitting,' 'allowing,' 'suffering' and 'knowingly.' This state of mind has generally been described as connivance . . ." Edwards, *supra* note 1, at 298.

63. Formulations using Model Penal Code language or elements of wilful ignorance virtually always include references to alternative or additional elements, including recklessness-based language and wilfulness-based language. Cases using recklessness-based language include *United States v. Hanlon*, 548 F.2d 1096, 1100 n.7 (2d Cir. 1977); *United States v. Bernstein*, 533 F.2d 775, 796 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976); *United States v. Jacobs*, 475 F.2d 270, 287 n.37 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973). Cases using wilfulness-based language include *United States v. Guray*, 860 F.2d 521, 526 n.5 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir.), *cert. denied*, 487 U.S. 1222 (1988); *United States v. Gatzonis*, 805 F.2d 72, 73 & n.2 (2d Cir. 1986), *cert. denied*, 484 U.S. 932 (1987); *United States v. Lanza*, 790 F.2d 1015, 1023 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986); *United States v. Kallashi*, 785 F.2d 26, 27-28 & n.2 (2d Cir. 1986); *United States v. Caminos*, 770 F.2d 361, 366 (3d Cir. 1985); *United States v. Guzman*, 754 F.2d 482, 488 (2d Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985); *United States v. Cano*, 702 F.2d 370, 371 (2d Cir. 1983); *United States v. Garzon*, 688 F.2d 607, 609 n.3 (9th Cir. 1982); *United States v. Nicholson*, 677 F.2d 706, 710 (9th Cir. 1982); *United States v. Batencort*, 592 F.2d 916, 918 n.3 (5th Cir. 1979); *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324 n.1 (9th Cir. 1977); *United States v. Brawer*, 482 F.2d 117, 128 n.14 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974).

64. In addition to these three groups, there are definitions of wilful ignorance that include negligence-based elements or descriptions of the doctrine. See, e.g., *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.) (refusing to overturn a conviction in which the jury instruction read: "[n]o person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate"), *cert. denied*, 476 U.S. 1186 (1986); *United States v. Eaglin*, 571 F.2d 1069, 1074 (9th Cir. 1977) (approving the jury's conviction of a defendant who "intentionally avoid[ed] knowledge by closing his eyes to facts which should prompt him to investigate"), *cert. denied*, 435 U.S. 906 (1978); *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 59 (8th Cir. 1973) ("[A] 'guilty avoidance of knowledge' and a 'bona fide belief resulting from negligence' can form generally the requisite criminal scienter."); *McClure v. People*, 61 P. 612, 617 (Colo. 1900) (conflating wilfulness and negligence: "defendant was ignorant of the insolvency of the bank because he willfully ('willfully' in the sense of 'intentionally') neglected the means whereby he could or might have ascertained its condition"); *State v. Lintner*, 41 P.2d 1036, 1038 (Kan. 1935) (upholding a conviction for the sale of stock by false pretenses when the defendant "ma[de] representations as to value . . . improvidently and without investigation"); *State v. Drew*, 124 N.W. 1091, 1092 (Minn. 1910) ("A

groups: "pure" forms, in which the specified type of language is the only description of the doctrine;⁶⁵ mixed disjunctive forms, in which the specified language and another type of wilful ignorance language are used as alternative descriptions of the doctrine;⁶⁶ and mixed conjunctive forms, which indicate that the specified language and some other form of wilful ignorance language are both required to establish wilful ignorance.⁶⁷

The Model Penal Code treatment of wilful ignorance is easiest to explicate. After defining criminal knowledge, the Code states that "knowledge [of the existence of a fact] is [also] established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."⁶⁸ This section is designed to deal with the doctrine of wilful ignorance, which, as commentary to the Code describes it, involves "the case of the actor who is aware of the probable existence of a material

banker receiving deposits of money cannot shut his eyes to his own financial status, and he is required to investigate conditions which are suggested by circumstances already known to him."); *People v. Burgess*, 155 N.E. 745, 748 (N.Y. 1927) (allowing the jury to impute knowledge of company records to the defendant if he "recklessly and willfully closed his eyes to sources of information which the jury might find he should have consulted in the exercise of ordinary good faith").

Negligence-based elements appear infrequently, and they will not be examined in more detail. Since this Article concludes that recklessness-based definitions describe a construct that is insufficiently culpable to satisfy a mens rea of knowledge, it follows that negligence-based definitions, which describe a construct of even lower culpability, are likewise unacceptable as knowledge substitutes. *Cf. Alvarado*, 838 F.2d at 314 (admonishing the trial court that a wilful ignorance instruction "should . . . be given rarely because of the risk that the jury will convict on a standard of negligence: that the defendant *should* have known the conduct was illegal"); *Garzon*, 688 F.2d at 609 (same).

65. See *infra* notes 81 and 97, and accompanying text.

66. For example, several courts have held that a jury charge may include wilfulness or Model Penal Code elements, see *Lanza*, 790 F.2d at 1023; *Caminos*, 770 F.2d at 366; *United States v. Precision Medical Lab., Inc.*, 593 F.2d 434, 445 (2d Cir. 1978); *Batencort*, 592 F.2d at 918 & n.3; *Murrieta-Bejarano*, 552 F.2d at 1324 & n.1, while others have approved instructions given alternatively in terms of the Code, wilfulness, and "reckless disregard," see *Jacobs*, 475 F.2d at 287 & n.37; *United States v. Sarantos*, 455 F.2d 877, 880 (2d Cir. 1972); *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); see also *Hanlon*, 548 F.2d at 1100-02 (permitting a charge that included recklessness-based elements as an alternative to wilfulness plus Code-based elements); *United States v. Thomas*, 484 F.2d 909, 912-14 (6th Cir.) (upholding the charge despite use of the disjunctive "or" between recklessness and wilfulness elements), *cert. denied*, 414 U.S. 912 (1973) and 415 U.S. 924 (1974).

67. The courts have used a variety of combinations, such as wilful ignorance and Code-based "balancing" language, see, e.g., *Alvarado*, 838 F.2d at 314; *Kallash*, 785 F.2d at 28; *United States v. Suttiswad*, 696 F.2d 645, 653 (9th Cir. 1982); *United States v. Gentile*, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976), deliberate avoidance and Code-based "high probability" language, see, e.g., *Guzman*, 754 F.2d at 488; *McAllister*, 747 F.2d at 1275; *Cano*, 702 F.2d at 371, wilfulness and Code-based "high probability" elements, see, e.g., *Garzon*, 688 F.2d at 609, "reckless disregard" and wilful ignorance language, see, e.g., *United States v. Cook*, 586 F.2d 572, 579 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 and 435 U.S. 945 (1978); *United States v. Wright*, 537 F.2d 1144, 1145 (1st Cir.), *cert. denied*, 429 U.S. 924 (1976), and recklessness and wilfulness, see, e.g., *United States v. Abrams*, 427 F.2d 86, 91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

68. MODEL PENAL CODE § 2.02(7).

fact but does not determine whether it exists or does not exist."⁶⁹ The Code's definition contains two important elements: awareness of a high probability of the existence of a fact, and the absence of an actual belief in the nonexistence of the fact.⁷⁰ In recent years, jury charges often include one⁷¹ or both⁷² of these elements, but courts rarely, if ever, use these elements alone to describe the notion of wilful ignorance.⁷³

Next are recklessness-based descriptions. These are typified by expressions such as the following: "recklessly stated as facts matters of which he knew he was ignorant";⁷⁴ "an act could be done wilfully, knowingly and unlawfully, if it is done recklessly . . . without regard to whether it was true or false";⁷⁵ "recklessly and wilfully closed his eyes

69. *Id.* § 2.02 cmt. 9, at 248.

70. *Id.* § 2.02(7). This second part of the Model Penal Code's definition of wilful ignorance excuses an actor who has a mistaken belief contrary to the fact of which knowledge is required for conviction. *See id.* For an interesting discussion of whether that excuses the actor regardless of whether his mistaken belief caused him to act as he did, or regardless of whether the mistaken belief was caused by factors external to his will, see Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1104 (1985).

71. For examples of charges including the Code-based element of "high probability," see *Guzman*, 754 F.2d at 488; *McAllister*, 747 F.2d at 1275; *Cano*, 702 F.2d at 371; *Garzon*, 688 F.2d at 609 & n.3; *see also* *United States v. Valle-Valdez*, 554 F.2d 911, 913-14 (9th Cir. 1977) (holding an instruction deficient because the wilfulness-based charge did not contain high probability language); *United States v. Squires*, 440 F.2d 859, 864 (2d Cir. 1971) (holding an instruction deficient because the recklessness-based charge did not contain high probability language).

For examples of charges including the Code-based element of "contrary belief" (often referred to as "balancing" language), see *Alvarado*, 838 F.2d at 314; *Kallash*, 785 F.2d at 28; *Suttiswad*, 696 F.2d at 650; *United States v. Hanlon*, 548 F.2d 1096, 1100 n.7 (2d Cir. 1977); *Genitle*, 530 F.2d at 469-70; *see also* *United States v. Esquer-Gamez*, 550 F.2d 1231, 1235-36 (9th Cir. 1977) (reversing a wilfulness-based charge on the ground that it did not contain balancing language).

72. Cases using both Code elements and wilfulness language include *United States v. Gurary*, 860 F.2d 521, 526 & n.5 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *United States v. Gatzonis*, 805 F.2d 72, 73 (2d Cir. 1986), *cert. denied*, 484 U.S. 932 (1987); *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985); *United States v. Beckett*, 724 F.2d 855, 856 n.1 (9th Cir. 1984). For examples of cases using both Code elements as an alternative to wilfulness, *see* *United States v. Lanza*, 790 F.2d 1015, 1023 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986); *United States v. Caminos*, 770 F.2d 361, 366 (3d Cir. 1985); *United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982); *United States v. Batencort*, 592 F.2d 916, 919 & n.3 (5th Cir. 1979); *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324 & n.1 (9th Cir. 1977); *United States v. Brawer*, 482 F.2d 117, 128 & n.14 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *see also* *United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir.) (using both Code elements as alternatives to recklessness and wilfulness), *cert. denied*, 414 U.S. 821 (1973). Several cases have also found that wilfulness language alone was harmless error in the circumstances at issue, but strongly encouraged the use of both Code elements in the future. *See, e.g.*, *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988); *United States v. Shareef*, 714 F.2d 232, 233-34 (2d Cir. 1983); *United States v. Jewell*, 532 F.2d 697, 701-04 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

73. For examples of Code-based language combined with other formulations, see the cases listed *supra* notes 66-67. At least one court has suggested that use of the Code-based formulation alone "might be improper." *Jacobs*, 475 F.2d at 287; *accord Brawer*, 482 F.2d at 128-29.

74. *United States v. Natelli*, 527 F.2d 311, 322 n.9 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *accord* *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

75. *United States v. Precision Medical Lab., Inc.*, 593 F.2d 434, 445 n.11 (2d Cir. 1978) (quoting

to sources of information";⁷⁶ "demonstrated at the very least a reckless indifference to the truth";⁷⁷ and "with reckless disregard of whether the statements made were true,"⁷⁸ "what the truth was,"⁷⁹ or "whether the bills were stolen."⁸⁰

Recklessness-based formulations sometimes comprise the entire jury charge on wilful ignorance⁸¹ and at other times appear along with wilfulness-based⁸² or Code-based language.⁸³ In the latter instances,

the trial court's jury instructions).

76. *People v. Burgess*, 155 N.E. 745, 748 (N.Y. 1927). *Burgess* also described wilful ignorance in negligence terms: the defendant "closed his eyes to sources of information which the jury might find he should have consulted," *id.* at 748, and made representations "which he would have known were false if he had chosen to use sources of information which were easily available, or to make such investigation as any man who desired to speak the truth would have made," *id.* at 746.

77. *United States v. Slineer*, 410 F.2d 337, 341 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969).

78. *United States v. Sarantos*, 455 F.2d 877, 880 (2d Cir. 1972); *United States v. Thomas*, 484 F.2d 909, 913 (6th Cir.) (quoting the *Sarantos* language), *cert. denied*, 414 U.S. 912 (1973) and 415 U.S. 924 (1974); *see also* *United States v. Hanlon*, 548 F.2d 1096, 1100 n.7 (2d Cir. 1977) (upholding a charge requiring that the defendant "had acted in reckless disregard of whether such representation was false"); *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir.) (upholding a charge requiring only that the defendant have acted "with reckless disregard of whether the statement . . . was true"), *cert. denied*, 404 U.S. 994 (1971).

79. *Hanlon*, 548 F.2d at 1100 n.7. Though the appellate court upheld the conviction in *Hanlon*, it criticized the use of the term "reckless," which it considered "technical and confusing" and which "might tend to mislead the jury." *Id.* at 1101-02.

80. *United States v. Jacobs*, 475 F.2d 270, 287 n.37 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).

81. Some cases cited as examples of wilful ignorance cases, which use recklessness language in their charge on mens rea do not appear to contain true wilful ignorance jury charges. *See* *Robbins*, *supra* note 1, at 197-99 (citing *People v. Cummings*, 55 P. 898 (Cal. 1899); *State v. Rupp*, 151 P. 1111 (Kan. 1915); and *Rand v. Commonwealth*, 195 S.W. 802 (Ky. Ct. App. 1917); *State v. Pickus*, 257 N.W. 284 (S.D. 1934), as examples of wilful ignorance cases). This observation is particularly true of supposed wilful ignorance cases in which the jury charge contains recklessness language alone, without wilfulness-based or Code-based elements of wilful ignorance. *See, e.g.*, *United States v. Squires*, 440 F.2d 859, 862 n.5 (2d Cir. 1971) ("[I]f you find [defendant's] signing the form without reading it was so unjustified by the circumstances surrounding the transaction that it was reckless conduct—you may find that the defendant acted wilfully and knowingly, even though he was actually ignorant of the prohibition of this statute."); *Cummings*, 55 P. at 899 ("[A] question for the jury [is] whether defendant uttered such representations, knowing them to be false, or (which is tantamount to knowledge of falsity) recklessly, and without information justifying a belief that they were true."); *Rupp*, 151 P. at 1111 ("Before you can find the defendant guilty, . . . you must be satisfied . . . that the defendant . . . made such affidavit without careful inquiry and investigation as to her age, and in reckless disregard of his duty to know the facts to which he is alleged to have sworn . . ."); *Rand*, 195 S.W. at 808 ("[M]aking a statement recklessly and without information justifying a belief in its truth is equivalent to the making of a statement knowing it to be false."); *Pickus*, 257 N.W. at 286, 293 ("[M]aking a statement that is in fact false recklessly without information to justify a belief in its truth is equivalent to making a statement knowing it to be false.")

82. *See, e.g.*, *United States v. Precision Medical Lab., Inc.*, 593 F.2d 434, 444-46 (2d Cir. 1978) (approving an instruction that allowed the jury to find the necessary scienter from wilfulness or recklessness); *United States v. Cook*, 586 F.2d 572, 579-80 (5th Cir. 1978) (approving a charge containing recklessness and wilfulness elements), *cert. denied*, 442 U.S. 909 (1979); *United States v. Evans*, 559 F.2d 244, 245-46 (5th Cir. 1977) (same), *cert. denied*, 434 U.S. 1015 and 435 U.S. 945 (1978); *Hanlon*, 548 F.2d at 1100-02 (approving an instruction charging the jury that the element of knowledge could be satisfied with reckless disregard or with a deliberate closing of one's eyes to the

charges sometimes use the conjunction "or"⁸⁴ or use no conjunction between the different formulations,⁸⁵ implying that the recklessness-based formulation is an alternative means of establishing wilful ignorance. At other times, jury instructions use the conjunction "and" between the different formulations,⁸⁶ indicating that both recklessness-based factors and wilfulness- or Code-based factors are required to establish wilful ignorance.

Finally, there are wilfulness-based constructions of the doctrine. These are typified by language such as the following: "purposely refrains from obtaining . . . knowledge";⁸⁷ "willfully and intentionally remain

obvious); *United States v. Natelli*, 527 F.2d 311, 322-24 (2d Cir. 1975) (approving the trial court's charge that wilfulness could be inferred from "reckless deliberate indifference"), *cert. denied*, 425 U.S. 934 (1976); *Thomas*, 484 F.2d at 914 (approving the jury charge that scienter could be established with reckless disregard or a conscious effort to remain ignorant); *Jacobs*, 475 F.2d at 287-88 (approving the jury charge that scienter could be established with reckless disregard and a conscious purpose to remain ignorant); *Sarantos*, 455 F.2d at 880 (approving a charge that allowed the jury to find scienter from recklessness or wilfulness); *Egenberg*, 441 F.2d at 444 (same).

83. *See, e.g., Jacobs*, 475 F.2d at 287-88 (approving a charge that alternately instructed that recklessness and wilfulness could satisfy scienter or that the Code-based formulation could establish knowledge); *cf. United States v. Bernstein*, 533 F.2d 775, 801 (2d Cir.) (Van Granfeiland, J., dissenting) (criticizing a jury charge using recklessness and a Code-based formulation), *cert. denied*, 429 U.S. 998 (1976).

84. *See, e.g., Natelli*, 527 F.2d at 322 n.9 (charging the jury to consider whether defendant "deliberately closed his eyes to the obvious . . . or whether he recklessly stated as facts matters of which he knew he was ignorant"); *Thomas*, 484 F.2d at 912-13 ("Defendant acted with reckless disregard of whether the statements made were true or with a conscious purpose to avoid learning the truth."); *Sarantos*, 455 F.2d at 880 (approving charge language, "with reckless disregard of whether the statements made were true or with a conscious effort to avoid learning the truth"); *Egenberg*, 441 F.2d at 444 (approving charge language, "with reckless disregard of whether the statement . . . was true" or . . . "with a conscious purpose to avoid learning the truth" (quoting *United States v. Abrams*, 427 F.2d 86, 91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970))).

85. For example, the *Jacobs* jury charge reads:

Knowledge is established if the defendant was aware of a high probability that the bills were stolen, unless the defendant actually believed that the bills were not stolen.

. . . . The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him.

Thus if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth the requirement of knowledge would be satisfied, unless the defendant actually believed they were not stolen.

Jacobs, 475 F.2d at 287 n.37; *see Precision Medical*, 593 F.2d at 445 nn.10-11; *Hanlon*, 548 F.2d at 1100 n.7.

86. For example, a typical jury instruction might read: "with reckless disregard for the truthfulness of the claim and with the conscious purpose to avoid learning the truthfulness of the claim." *Cook*, 586 F.2d at 579; *see Evans*, 559 F.2d at 246; *Jacobs*, 475 F.2d at 287 n.37; *see also Hanlon*, 548 F.2d at 1100 n.7 (using "unless" to connect recklessness and a Code-based "balancing" element: "knowledge . . . may be satisfied by proof that a defendant acted with reckless disregard of what the truth was, unless he actually believed the contrary to be true").

87. *Rumely v. United States*, 293 F. 532, 553 n.2 (2d Cir.), *cert. denied*, 263 U.S. 713 (1923).

ignorant of a fact”;⁸⁸ “deliberately chose not to learn”;⁸⁹ “with a conscious purpose to avoid learning the truth”;⁹⁰ “purposefully contrived to avoid learning of the illegal conduct”;⁹¹ “deliberately and consciously avoided confirming”;⁹² “deliberate avoidance of positive knowledge”;⁹³ and “deliberately closed his eyes to what would otherwise have been obvious to him.”⁹⁴

Purposefulness-type language appears most consistently in jury instructions on wilful ignorance, dating back to the earliest cases⁹⁵ and continuing to the present.⁹⁶ Purposefulness language may comprise the entire charge on wilful ignorance⁹⁷ or may appear conjunctively or

88. *United States v. Joly*, 493 F.2d 672, 674 (2d Cir. 1974).

89. *United States v. Olivares-Vega*, 495 F.2d 827, 830 n.10 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *accord United States v. Guzman*, 754 F.2d 482, 488 (2d Cir. 1985) (using the language “deliberately refused to learn the facts”), *cert. denied*, 474 U.S. 1054 (1986).

90. *United States v. Gurary*, 860 F.2d 521, 526 n.5 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985); *United States v. Valle-Valdez*, 554 F.2d 911, 913 (9th Cir. 1977) (emphasis omitted); *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976); *see also United States v. Martin*, 773 F.2d 579, 584 (4th Cir. 1985) (approving charge language, “conscious purpose to avoid enlightenment”).

91. *United States v. Farfan-Carreon*, 935 F.2d 678, 680 (5th Cir. 1991); *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

92. *United States v. Kallash*, 785 F.2d 26, 28 n.2 (2d Cir. 1986); *accord United States v. Restrepo-Granda*, 575 F.2d 524, 528 n.2 (5th Cir.) (“deliberately and consciously tried to avoid learning”), *cert. denied*, 439 U.S. 935 (1978).

93. *United States v. Joly*, 493 F.2d 672, 674 (2d Cir. 1974).

94. *United States v. Callahan*, 588 F.2d 1078, 1082 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); *United States v. Gentile*, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); *United States v. Brawer*, 482 F.2d 117, 128 n.14 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *see United States v. Alvarado*, 838 F.2d 311, 315 (9th Cir.), *cert. denied*, 487 U.S. 1222 (1988); *United States v. Shareef*, 714 F.2d 232, 233 (2d Cir. 1983); *United States v. Joyce*, 542 F.2d 158, 161 n.11 (2d Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *Joly*, 493 F.2d at 674 (all using substantially similar language). These particular formulations may constitute negligence-level charges, as an objective standard is used to determine whether the thing that was avoided was obvious or not.

95. *See, e.g., Rumely v. United States*, 293 F. 532, 553 n.2 (2d Cir.) (approving jury charge language, “purposely refrains from obtaining that knowledge” and “willful purpose not to acquire the knowledge”), *cert. denied*, 263 U.S. 713 (1923); *United States v. Allis*, 73 F. 165, 170 (C.C.E.D. Ark. 1893) (using jury charge language, “keep himself in ignorance, willfully shut his eyes to the truth”), *aff'd*, 155 U.S. 117 (1894); *United States v. Graves*, 53 F. 634, 658 (N.D. Iowa 1892) (using jury charge language, “purposely keeps himself in ignorance”), *rev'd*, 165 U.S. 323 (1897).

96. *See, e.g., United States v. Bussey*, 942 F.2d 1241, 1246 (8th Cir. 1991) (approving jury charge language, “defendant deliberately closed his eyes to what would otherwise have been obvious to him” and “conscious purpose to avoid enlightenment”), *cert. denied*, 112 S. Ct. 1936 (1992); *United States v. Farfan-Carreon*, 935 F.2d 678, 680 n.4 (5th Cir. 1991) (approving jury charge language, “defendant deliberately closed his eyes to what otherwise would have been obvious to him” and “defendant deliberately blinded himself to the existence of a fact”); *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir. 1991) (same as *Bussey*), *cert. denied*, 112 S. Ct. 320 (1991).

97. *See, e.g., United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988); *United States v. Josefik*, 753 F.2d 585, 589 (7th Cir.), *cert. denied*, 471 U.S. 1055 (1985); *Shareef*, 714 F.2d at 233; *United States v. Burns*, 683 F.2d 1056, 1059 (7th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983); *Callahan*, 588 F.2d at 1082; *United States v. Morales*, 577 F.2d 769, 773 (2d Cir. 1978); *United States v.*

disjunctively together with either Code-based or recklessness-based formulations.⁹⁸ The implications of each of these situations are discussed below.

C. *Defining Knowledge and Recklessness*

Articulating some generally acceptable concept of knowledge and recklessness for purposes of criminal liability is a difficult task. No single definition of knowledge is universally agreed upon or regularly employed,⁹⁹ even within the limited context of criminal mens rea.¹⁰⁰

Restrepo-Granda, 575 F.2d 524, 528 n.2 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978); *United States v. Eaglin*, 571 F.2d 1069, 1074 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); *United States v. Valle-Valdez*, 554 F.2d 911, 913 (9th Cir. 1977); *United States v. Esquer-Gamez*, 550 F.2d 1231, 1235 n.2 (9th Cir. 1977); *Joyce*, 542 F.2d at 161 n.11; *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976); *United States v. Dozier*, 522 F.2d 224, 226 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States v. Olivares-Vega*, 495 F.2d 827, 830 n.10, 11 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *Joby*, 493 F.2d at 674; *United States v. Grizaffi*, 471 F.2d 69, 75 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973); *Rumely*, 293 F. at 553 n.2.

98. For examples of wilfulness terms mixed with recklessness terms, see *supra* note 82. For examples of wilfulness terms mixed with Code-based terms, see *supra* notes 71-72.

99. The term knowledge is not always intended to denote the same thing in all areas of law. For example:

Suppose a person has been told that a certain bill of exchange is a forgery and he believes the statement to be true. Does he have *knowledge* of this? Obviously not if the purpose of the inquiry is to determine whether he is qualified to take the witness stand and swear that the instrument is false; but if he passes the bill as genuine he will be uttering a forged instrument with "knowledge" of the forgery if his belief is correct.

PERKINS & BOYCE, *supra* note 1, at 865 (footnotes omitted) (emphasis in original); see also *State v. Perkins*, 160 So. 789, 791 (La. 1935) (noting that the "extent" of knowledge "is not always the same when used in connection with different statutes relating to different subjects").

100. Knowledge arises as a mens rea issue in criminal law both because it is sometimes required by the definition of a particular crime, and because it is sometimes a determining factor in establishing a different required state of mind, such as intent, wilfulness, or malice. PERKINS & BOYCE, *supra* note 1, at 862. In fact, in traditional criminal law "intent" was often used not only to indicate our common dictionary understanding of purpose or aim, but also to mean what we ordinarily describe as knowledge. LAFAVE & SCOTT, *supra* note 32, § 3.5(b), at 218; see Glanville Williams, *The Mental Element in Crime*, 27 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 193, 195 (1957-58) ("It can be strongly argued that at common law the concept of intention includes not only the desire, object or purpose to achieve a consequence by means of conduct but also the mere knowledge that such a consequence is the certain outcome of one's conduct."). But see LAFAVE & SCOTT, *supra* note 32, § 3.5(b), at 218 (noting that MODEL PENAL CODE § 2.02(a)-(b) exemplifies the "modern view" by defining knowledge as a mental state distinct from purpose or intent). Even when knowledge itself is the required mental state in a criminal statute, courts have interpreted the term in very different ways. See PERKINS & BOYCE, *supra* note 1, at 865-66 (noting that while some courts use an "objective test of 'knowledge,'" the better approach is to use a "subjective test"). A number of these definitions are quite different from that contained in the Model Penal Code. See *id.* at 871 (noting that the Model Penal Code "covers much less than 'knowledge' as it has been interpreted as a mens-rea requirement in the common law"); Perkins, *supra* note 1, at 959 ("Although 'knowledge' as a mens rea concept of the common law includes guilty belief and guilty avoidance of knowledge, much less is included under the provisions of the Model Penal Code."); see also LAFAVE & SCOTT, *supra* note 32, § 3.5(b), at 220 (noting "that the word 'knowledge'—used in criminal statutes with some frequency—has not always

Therefore, an analytically reasonable understanding will have to suffice.¹⁰¹

Assuming that knowledge is possible,¹⁰² most would agree that in order to say we know something we must at least subjectively believe it to be so.¹⁰³ One would not normally say that one knows something unless one feels fairly certain of it in one's own mind.¹⁰⁴ Two elements are contained in this understanding: (1) belief, or a feeling of certainty or near certainty,¹⁰⁵ and (2) subjectivity, or the requirement that the knowing party possess the belief himself.¹⁰⁶ Stated in a different way (which will become important in later analysis), absence of belief in a proposition negates knowledge of that proposition.

been interpreted as having the meaning given in the Model Penal Code").

101. A definition of knowledge may encompass more than one understanding or state of mind. See PERKINS & BOYCE, *supra* note 1, at 865-70.

102. In the philosophical sense, some question whether we can truly ever know anything. See Anthony Quinton, *Knowledge and Belief*, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 345, 346 (Paul Edwards ed., 1967) ("[I]f knowledge entails truth, we can never attain knowledge or, at any rate, never know that we have done so."); PERKINS & BOYCE, *supra* note 1, at 865 ("Absolute knowledge can be had of very few things." (quoting *Story v. Buffum*, 90 Mass. (1 Allen) 35, 38 (1864))).

103. Perkins and Boyce explain that one who receives stolen property under the belief that it is stolen has knowledge of that fact, at least within the common-law interpretation of knowledge. See PERKINS & BOYCE, *supra* note 1, at 866 ("[K]nowledge or belief of the defendant must be personal to him." (quoting *Commonwealth v. Boris*, 58 N.E.2d 8, 12 (Mass. 1944))). They use this example to emphasize that "knowledge" . . . as a mens-rea requirement must be determined by a subjective test" rather than by an objective test. *Id.*

104. "[K]nowledge" and the knowing-type of 'intention' require a consciousness of almost-certainty" LAFAVE & SCOTT, *supra* note 32, § 3.7(f), at 239.

105. Certainty and near certainty are not the same. Indeed, philosophers argue that "[c]omplete certainty of a statement's truth is not to be had." Quinton, *supra* note 102, at 346. Nevertheless, the terms are being used here interchangeably because, if certainty exists at all, the difference appears to be one of degree rather than of kind, and the difference in degree is not materially relevant in this context. See WILLIAMS, *supra* note 1, § 54, at 152 n.11 ("A philosopher might say that my belief is as to probability, for there is no such thing as certainty. However, for legal purposes the probability may be so high as to be accounted certainty."). What is important is to indicate that the level of belief is exceptionally high when knowledge is involved. As Glanville Williams explains, "certainty is a matter of degree. In a philosophical view, nothing is certain; so-called certainty is merely high probability." *Id.* § 18, at 39. Williams nevertheless uses the term because

[w]e do in fact speak of certainty in ordinary life; and for purpose of the present rule [that one intends the consequences of one's acts if they are foreseen as "substantially certain,"] it means such a high degree of probability that common sense would pronounce it certain. Mere philosophical doubt, or the intervention of an extraordinary chance, is to be ignored.

Id. § 18, at 40. LaFave and Scott describe the required state as "a consciousness of almost-certainty." LAFAVE & SCOTT, *supra* note 32, § 3.7(f), at 239. The Model Penal Code refers to a "practically certain" state. MODEL PENAL CODE § 2.02(2)(b)(ii). Throughout the remainder of this Article, the terms "certainty," "near certainty," and "practical certainty" will be used interchangeably, unless some difference is specifically noted or discussed.

106. See *supra* note 103 and accompanying text; see also Robbins, *supra* note 1, at 222 ("[K]nowledge is a subjective standard in that it requires actual awareness by the actor."); *id.* at 210-11 (commenting that knowledge in the philosophical sense also requires subjective conviction).

In order to distinguish knowledge from mere belief,¹⁰⁷ some philosophers add that knowledge requires not only subjective certainty, as does belief, but also conclusive (or at least very good) evidence for the proposition known,¹⁰⁸ whereas belief requires no such evidence.¹⁰⁹ Others argue that the difference between knowledge and belief is the actual truth or existence of the proposition in question: if one is subjectively certain of proposition *p* and it is true, one knows *p*,¹¹⁰ while if one is subjectively certain of proposition *p* and it is false, one merely believes *p*.¹¹¹ For purposes of defining criminal knowledge, it does not appear to be necessary to resolve this philosophical issue; we do not normally impose criminal liability when the applicable mens rea is knowledge unless the thing that must be known actually is true or exists.¹¹² Hence, for

107. *But cf.* Cohn v. People, 64 N.E. 306, 307 (Ill. 1902) (implying that no more than belief may be necessary to establish knowledge: "[e]vidence of facts and circumstances sufficient to create in the minds of the accused a belief that the goods were stolen may amount to guilty knowledge of the fact" (citation omitted)).

108. "According to the most widely accepted definition, knowledge is *justified true belief.*" Quinton, *supra* note 102, at 345 (emphasis added); *see also* Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 877 & n.19 (1989) (describing knowledge as justified true belief, yet noting that some have questioned this traditional account of knowledge); Robbins, *supra* note 1, at 210-11 ("Knowledge is often defined as subjective certainty coupled with conclusive evidence for the proposition. In contrast, belief is certainty based on insufficient evidence." (footnotes omitted)). For a general discussion of the distinction between knowledge and belief, *see id.* at 210-20.

109. *See* Robbins, *supra* note 1, at 211 & n.135.

110. "It is obvious and generally admitted that we can have knowledge only of what is true." Quinton, *supra* note 102, at 345.

111. *See* Robbins, *supra* note 1, at 211 & n.136.

112. Two ostensible exceptions to this proposition come to mind, involving impossibility and result elements, but they may not, on closer examination, actually be exceptions. First, in the situation described as "impossibility," we may impose criminal liability when the applicable mens rea is often described as "knowledge" even though the thing that must be known does not actually exist or is not actually so. When one intends to commit a crime and attempts to do so, but it is not possible to commit the crime because some attendant circumstance is not as the actor believed it to be, some would find the actor nonetheless criminally liable for what he attempted to do. *See* PERKINS & BOYCE, *supra* note 1, at 627-29; *see, e.g.,* People v. Siu, 271 P.2d 575, 576-77 (Cal. Ct. App. 1954) (affirming a conviction for the attempted possession of narcotics, even though the substance, which the defendant thought was heroin, was actually talcum powder); State v. Mitchell, 71 S.W. 175, 177-78 (Mo. 1902) (affirming a conviction for attempted murder even though the defendant fired at an empty bed, which he thought was occupied by the intended victim); State v. Damms, 100 N.W.2d 592, 597 (Wis. 1960) (affirming an attempted murder conviction even though the gun used in the attempt was inadvertently unloaded). *But see, e.g.,* State v. Guffey, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953) (reversing convictions for attempting to hunt deer out of season because the defendants mistakenly shot at a stuffed deer, reasoning that it is not an offense "to attempt to do that which it is legally impossible to do"), *superseded by statute*, MO. ANN. STAT. § 564.011(2) (Vernon 1979); State v. Taylor, 133 S.W.2d 336, 341-42 (Mo. 1939) (reversing a conviction for attempting to bribe a juror because the person the defendant attempted to bribe was no longer a juror at the time); People v. Jaffe, 78 N.E. 169, 169-70 (N.Y. 1906) (reversing a conviction for attempting to receive stolen goods because the goods that the defendant believed to be stolen were in fact not stolen). *See generally* LAFAYE & SCOTT, *supra* note 32, § 6.3(a), at 510-18 (discussing the doctrine of impossibility as it relates to attempt); *id.* § 6.5(b),

these purposes, we can assume that knowledge requires both belief, or subjective certainty, and the actual truth or existence of the thing known.¹¹³ In short, criminal knowledge is correct belief.¹¹⁴

at 545-47 (discussing the doctrine as it relates to conspiracy). Impossibility is the subject of considerable analysis and debate in the literature. See, e.g., JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 586-99 (2d ed. 1960) (discussing the doctrine of impossibility and the interplay between factual impossibility and the principle of legality); Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20 (1968) (criticizing the common law theoretical distinction between legal and factual impossibility); Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969) (reviewing the doctrine of impossibility as applied in attempt cases); see also Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 71 (1930) (arguing that it may be possible to reconcile the outcomes of intent cases by assuming the abstraction of impossibility); Francis B. Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 854 (1928) (disapproving of any tendency in the law that allows the impossibility of completing an intended crime to absolve the defendant of criminality in the attempt).

This apparent exception, however, may not be an actual exception, for, as the Model Penal Code recognizes, the applicable mens rea in impossible attempt situations may not really be "knowledge," but rather "belief." Under the Model Penal Code resolution, the actor is judged on the basis of his belief as to the attendant circumstances, and it is irrelevant whether or not his belief is correct: "(1) A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be." MODEL PENAL CODE § 5.01(1)(a); see *id.* § 5.01 cmt. 1, at 299 ("Subsection (1)(a) covers cases where the offense involves engaging in particularly described conduct, but where the failure occurs because of the non-existence of a requisite circumstance."). If only belief is required, the thing to be "known" need not actually exist or be so.

Second, a similar issue arises with regard to whether one may be held responsible for knowingly committing a crime that has as an element causing a particular result. When he acts, an individual cannot know that he will cause a particular result because the result of his action is a fact that does not exist until after he has acted. See *infra* notes 115-16 and accompanying text. Yet some would hold the actor liable for causing the result even when "knowledge" is the term used to describe the culpable mental state required with regard to the result element. See, e.g., MODEL PENAL CODE § 2.02(2)(b)(ii) ("A person acts knowingly with respect to a material element of an offense: . . . (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."); *cf. id.* § 2.03(2) ("When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or contemplation of the actor . . ."). In this instance, the Model Penal Code is simply defining "knowledge" of result elements to mean belief, so that the result, again, need not actually exist at the time the actor acts.

In both the impossibility and result element situations, the central issue is whether to punish on the basis of the harm that actually results from one's actions, or to punish on the basis of one's actions and mental state alone without regard to resulting harm. Although, for purposes of the analysis in this Article, I have posited that knowledge is *correct* belief and cannot be had of a *future* fact or event, these situations involve actors who are culpable and ought to be accountable, even though they did not have a correct belief regarding a present fact when they acted. One means of holding someone criminally accountable in the impossibility situation, or for causing a result that one could not have known would result, is by expanding the definition of knowledge, as the Model Penal Code does with regard to result elements. Another means might be to define culpability to be belief, as the Code does with regard to attendant circumstances in attempt, rather than to expand the definition of the term "knowledge." In both these situations, however, it is really belief and not knowledge that is required, so the textual proposition remains accurate.

113. "Knowledge . . . requires awareness of the *existence* of a fact rather than recognition of its probability." Robbins, *supra* note 1, at 222 (footnote omitted) (emphasis in original). One cannot be

Three features of knowledge have thus far been identified: (1) a belief, or feeling of near certainty, (2) that is subjective, and (3) that is correct (that is, the known proposition is true). One additional characteristic of knowledge, which flows from the last feature noted above, is important: in order for the known proposition to be true or correct, it must describe a past or present fact and not a future fact or event. No matter how likely something is to occur, and no matter how certain one feels that it will occur, one cannot know the future.¹¹⁵ Therefore, criminal knowledge is a subjective belief in or near certainty about a past or present true or existent fact.¹¹⁶

convicted of attempting to receive stolen merchandise when the offense requires knowledge that the merchandise is stolen and the merchandise is not actually stolen, even if the actor believes it to be stolen. *See id.* at 222 n.207; *see also Jaffe*, 78 N.E. at 170 ("No man can know that to be so which is not so in truth and in fact."); *supra* note 112 (discussing the doctrine of impossibility).

Perkins and Boyce use an interesting example that also supports this point, although somewhat indirectly. A Colorado statute that punished receiving stolen property knowing it to be stolen was amended to punish receiving "anything of value of another knowing or believing . . . said thing had been stolen." The alteration of the statute allowed for the conviction of one who received property he believed to be stolen that was not actually stolen. Perkins and Boyce identify this as a logical holding because the original statute, by using the term "knowing," already punished receipt of property that was actually stolen if the receiver believed it to be stolen. *See PERKINS & BOYCE, supra* note 1, at 867.

114. Perkins and Boyce list several versions of criminal knowledge: (1) guilty knowledge, or awareness of a fact as a result of personal observation; (2) correct guilty belief; and (3) guilty avoidance of knowledge. *PERKINS & BOYCE, supra* note 1, at 870. The second version is knowledge as defined in the text so far. The third version takes two different forms: false statement of knowledge by one who is aware that he does not know, which the authors conclude is not always knowledge for mens rea purposes, and wilful ignorance. *See id.* at 869-70. As for the first version, one could argue that awareness of a fact as a result of personal observation is subsumed within correct belief. If something is a "fact," presumably it is true or exists. If one is aware of a fact because one personally observes it to be so, presumably one "believes" it to be so. To the extent that one might observe a fact and yet, for some perhaps irrational reason, not believe it to be so, one would not usually be said to have knowledge of the fact. Hence, awareness of a fact as a result of personal observation ought to be encompassed by correct belief in the fact.

115. A statement of one's knowledge concerning the probable occurrence of a future event is a proposition relating to a present fact, with the present fact being the probable future occurrence of the event. For example, if I say "I know the ball I am about to drop from the roof will probably fall to the ground," I am making a statement about a presently existing fact—there presently exists a strong probability that the ball will fall to the ground. I have accurately described my state of mind because I feel subjectively certain that the ball will probably fall, and I am correct—the ball will probably fall.

On the other hand, if I say "I know the ball will fall from the roof to the ground," I am inaccurately describing my state of mind; although I feel subjectively certain that the ball will fall, I cannot know that the ball will fall until it actually does fall. I cannot have a correct belief because I cannot be correct until the ball falls. In other words, I can know a past or present fact, but not a future fact.

116. There is disagreement in the criminal law over the proposition that one cannot commit a crime requiring knowledge of the consequences of one's actions, that is, knowledge of the future. Compare *WILLIAMS, supra* note 11, at 123 ("Although the word 'knowingly' is generally used in relation to circumstances, it is not incapable of applying to consequences.") with Christopher Slobogin, *A Rational Approach to Responsibility*, 83 MICH. L. REV. 820, 836 (1985) ("[O]ne rarely *knows* the consequences of one's acts before they occur. Rather, as modern criminal statutes recognize, the most

Recklessness, on the other hand, contains both subjective and objective elements.¹¹⁷ Like criminal negligence, recklessness "requires

that can be said is that one is 'practically certain' of such consequences." (emphasis in original) (footnote omitted). Many penal codes allow for homicides committed "knowingly." See, e.g., ARK. CODE ANN. § 5-10-103(a)(1) (Michie Supp. 1991); COLO. REV. STAT. ANN. § 18-3-103(1)(a) (West 1990); ILL. ANN. STAT. ch. 38, para. 9-1(a)(1)-(2) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 35-42-1-1(1) (West Supp. 1991); ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A),(C) (West 1983); N.J. STAT. ANN. § 2C:11-3(a)(2) (West Supp. 1991); 18 PA. CONS. STAT. ANN. § 2501(a) (1983); TENN. CODE ANN. § 39-13-210(a)(1) (1991); TEX. PENAL CODE ANN. § 19.01(a)(1) (Vernon 1989); UTAH CODE ANN. § 76-5-203(1) (Supp. 1991). Such provisions necessarily require that the guilty party "know" the future. For example, under such a provision, if a person acts to kill by shooting a gun at another person, at the moment he shoots he must "know" that his act will ultimately succeed, that is, that nothing will intervene to prevent the bullet from hitting the victim and that the victim will die from the gunshot.

The Model Penal Code provides for knowledge of future facts or occurrences, specifically, the results of one's conduct: "if [a material] element [of an offense] involves a result of his conduct, [a person acts knowingly when] he is aware that it is practically certain that his conduct will cause such a result." MODEL PENAL CODE § 2.02(2)(b)(ii). Commentary to this section qualifies the concept of knowledge of the future as "contingent":

With respect to result elements, one cannot of course "know" infallibly that a certain result will follow from engaging in conduct, and thus to some extent "knowledge," when applied to result elements, includes a contingency factor as well. This is expressed definitionally in terms of whether the actor is "practically certain" that the result will follow.

Id. § 2.02 cmt. 3 n.13.

Arguably, one ought not to consider a contingent state of mind as quite the same thing as a presently existing state of mind. An actor's presently existing state of mind (that is, existing at the time of his act) is ordinarily examined to determine whether he possesses the culpable mental state required for the commission of a crime. See *Hopt v. People*, 104 U.S. 631, 633-34 (1881) (holding that the defendant claiming drunkenness was entitled to a jury instruction stating that "the condition of the defendant's mind at the time the act was committed must be inquired after"); see also LAFAVE & SCOTT, *supra* note 32, § 3.11, at 268 ("[A] basic premise of Anglo-American criminal law [is] that the physical conduct and the state of mind must concur. Although it is sometimes assumed that [both must] exist at precisely the same moment of time, the better view is that there is concurrence when the defendant's mental state actuates the physical conduct." (footnotes omitted)); PERKINS & BOYCE, *supra* note 1, at 933 (explaining that the criminal act "must be attributable to" the actor's mental state). Indeed, some penal codifications do not specifically provide for knowing homicide, possibly because of this logical dilemma. See, e.g., CAL. PENAL CODE § 187(a) (West 1988); IOWA CODE ANN. § 707.2 (West 1979 & Supp. 1991); KY. REV. STAT. ANN. § 507.020(1) (Michie 1985); N.Y. PENAL LAW § 125.25 (McKinney 1987 & Supp. 1992); WASH. REV. CODE ANN. § 9A.32.050 (West 1988).

In any event, the basic analysis and comparison of definitions of criminal knowledge and of wilful ignorance contained in this Article would not be altered in any significant respect if criminal knowledge were understood to encompass knowledge of the future, that is, of the consequences of one's actions.

117. For example, Williams notes:

Even . . . subjective recklessness has an objective aspect. . . . It is subjective in that one must look into the mind of the accused in order to determine whether he foresaw the consequence. If the answer is in the affirmative, that is the end of the subjective part of the enquiry and the beginning of the objective part. One must ask whether in the circumstances a reasonable man having such foresight would have proceeded with his conduct notwithstanding the risk. Only if this second question, too, is answered in the affirmative is there subjective recklessness for legal purposes.

conduct which represents a gross failure to measure up to the reasonable-person standard of care."¹¹⁸ In setting this reasonable person standard, recklessness necessitates consideration of how someone other than the actor would view the situation.¹¹⁹ However, given such objectively measured conduct, recklessness, as distinguished from criminal negligence,¹²⁰ requires a particular subjective state of mind as well: that the actor "was aware of the risk he was creating, and consciously disregarded that risk."¹²¹ Thus, recklessness is "conscious risk creation,"¹²² with the element of conscious disregard supplying the subjective requirement that the actor personally recognize the particular risk.¹²³

Authorities are not in agreement as to the nature of the risk of which one must be aware in order to act recklessly. Some assert that the risk varies depending on the surrounding circumstances. Glanville Williams, for example, maintains that "[r]ecklessness occurs where the consequence [of one's action] is foreseen not as morally or substantially

WILLIAMS, *supra* note 1, § 25, at 58. He further observes:

The subjective theory of recklessness requires that the defendant should have foreseen the degree of probability of the consequence which is held to make the act reckless. . . . Thus the extent of probability of damage is a subjective question, dependent on the foresight of the accused; yet the social desirability of the risky conduct, and the question whether it balances the foreseen danger, are objective questions to be judged by the standard of the reasonable man.

Id. § 26, at 62; *cf.* Larry C. Wilson, *The Doctrine of Wilful Blindness*, 28 U. NEW BRUNSWICK L.J. 175, 192 (1979) (citing Glanville Williams's description of recklessness as subjective and objective and distinguishing the doctrine of wilful ignorance from recklessness).

118. PERKINS & BOYCE, *supra* note 1, at 850; *cf.* MODEL PENAL CODE § 2.02(2)(c) (stating that reckless conduct occurs when the actor's disregard of the nature and degree of risk "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation").

119. *Cf.* MODEL PENAL CODE § 2.02 cmt. 3, at 237 ("Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. . . . [T]he jury must evaluate the actor's conduct and determine whether it should be condemned." (emphasis in original)).

120. An actor may be said to be acting with criminal negligence if he engages in such objectively-measured inappropriate conduct "unaware of th[e] risk [he is creating], but under the circumstances he should have been aware of it." PERKINS & BOYCE, *supra* note 1, at 850. Criminal recklessness and negligence are said to be mutually exclusive, because recklessness "includes the very significant element of awareness, which is lacking in criminal negligence." *Id.* at 851; *see also* WILLIAMS, *supra* note 1, § 25, at 58 ("Recklessness is a branch of the law of negligence; it is that kind of negligence where there is foresight of consequences."). *See generally* PERKINS & BOYCE, *supra* note 1, at 849-51 (discussing confusion in the historically overlapping use of recklessness and negligence).

121. PERKINS & BOYCE, *supra* note 1, at 850.

122. MODEL PENAL CODE § 2.02 cmt. 3; *see also* WILLIAMS, *supra* note 1, § 24, at 53 ("Recklessness as to consequence occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk." (footnote omitted)).

123. Robbins, *supra* note 1, at 221; *see* MODEL PENAL CODE § 2.02 cmt. 3 (defining recklessness as involving actual awareness of risk). For a discussion of the subjective and objective components of recklessness, *see generally* Donald M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 316-71 (1981).

certain but only as 'probable' or 'likely,' or perhaps merely 'possible.'¹²⁴ Which of these adjectives applies depends on the probability that damage will occur, the extent of the potential damage if it does occur, and the social utility of the actor's conduct.¹²⁵ "[K]nowledge of bare possibility [of harm] is sufficient to convict of recklessness if the conduct has no social utility, but . . . the slightest social utility of the conduct will introduce an enquiry into the degree of probability of harm and a balancing of this hazard against its social utility."¹²⁶ In other words, one may be reckless for firing a shot into the air even if there is very little chance of the bullet hitting someone (a mere possibility), because the conduct has no social utility and the magnitude of the potential harm (death) is great.¹²⁷

The Model Penal Code, on the other hand, indicates that one acts recklessly only when "he consciously disregards a *substantial and unjustifiable* risk."¹²⁸ The substantiality and justifiability of the risk involved are considered in light of "the nature and purpose of the actor's conduct and the circumstances known to him,"¹²⁹ but are ultimately measured from an objective point of view.¹³⁰ Whether one accepts the

124. WILLIAMS, *supra* note 1, § 26, at 59 (footnote omitted).

125. *Id.* § 26, at 62. As Williams phrases it, "risk may be run for reasonable cause," such as the great risk undertaken in operating with a possibly unsterilized scalpel in an emergency situation. *Id.* § 26, at 61.

126. *Id.* § 26, at 62.

127. LaFave and Scott agree with this view, noting that "while 'knowledge' . . . require[s] a consciousness of almost-certainty, recklessness requires a consciousness of something far less than certainty or even probability." LAFAVE & SCOTT, *supra* note 32, § 3.7(f), at 239-40 (footnote omitted). Recklessness in causing a result exists when one is aware that his conduct "might" cause the result, even when the result is not substantially certain to occur. *Id.* § 3.7(f), at 239 (emphasis in original). For example:

One may act recklessly if he drives fast through a thickly settled district though his chances of hitting anyone are far less than [sic] 90%, or even 50%. Indeed, if there is no social utility in doing what he is doing, one might be reckless though the chances of harm are something less than 1%.

Id.

128. MODEL PENAL CODE § 2.02(2)(c) (emphasis added). See generally Treiman, *supra* note 123.

129. MODEL PENAL CODE § 2.02(2)(c).

130. "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.*

It is not entirely clear what the Model Penal Code considers to be the nature of the subjective component of recklessness. Possibilities include the following:

- (1) the actor must be aware that his action involves risk, but he need not be aware of the nature of that risk;
- (2) the actor must recognize that his action involves a substantial risk, but he need not be aware that the risk is also unjustifiable;
- (3) the actor must appreciate that his action involves a substantial risk, and also appreciate that the risk is unjustifiable;
- (4) the actor must be aware that his action involves risk, and he need not recognize that the risk is substantial or that it is unjustifiable, but he must be aware of factors or circumstances that indicate to the reasonable law-

Model Penal Code standard or that of other authorities, it is clear that, in order to act recklessly, one must be aware of something less than the certainty or near certainty of the fact in question, and one need not be aware of any more than a substantial probability of the fact.

D. *Comparing Knowledge and Recklessness*

Although criminal recklessness resembles criminal knowledge in that both require an actual subjective awareness by the actor,¹³¹ the two differ in several respects. First, the actor in each case is aware of a different thing. In order to be reckless the actor must be aware of the possibility or at most the substantial probability of a fact, but in order to act knowingly the actor must be aware of an actual fact.¹³² Stated another way, knowledge requires belief that a fact is certain or near certain, but recklessness requires an awareness that the fact is something less than certain, and it never requires an awareness that the fact is more than substantially probable.¹³³

Knowledge and recklessness differ also in that the former is an entirely subjective concept, while the latter requires both a subjective and an objective assessment.¹³⁴ In the case of recklessness, the actor must be

abiding person that the risk is substantial and/or unjustifiable.

Although the commentary to the Code on this issue is as ambiguous as the text itself, one comment appears to imply that the fourth posited understanding might have been intended. In observing that the jury must "examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it," the commentary notes that "[i]n each instance, the question is asked from the point of view of the actor's perceptions, i.e., to what extent *he was aware* of risk, of factors relating to its substantiality and of factors relating to its unjustifiability." *Id.* § 2.02 cmt. 3, at 238 (emphasis added). While recognizing arguments in support of one or another of the other three possibilities, I am assuming, for purposes of the analysis that follows, that this fourth possible interpretation is what is meant by Model Penal Code recklessness.

131. See Robbins, *supra* note 1, at 222; MODEL PENAL CODE § 2.02 cmt. 3.

132. See Robbins, *supra* note 1, at 222 (noting that knowledge "requires awareness of the existence of a fact rather than recognition of its probability" and that "recklessness describes recognition of probability while knowledge requires certainty" (emphasis in original) (footnotes omitted)).

133. Compare MODEL PENAL CODE § 2.02(2)(b) (stating that "knowingly" requires that an actor be "aware" that a circumstance exists, or "practically certain" that his conduct will cause a particular result) with *id.* § 2.02(2)(c) (stating that "recklessly" requires that an actor "consciously disregard . . . a substantial and unjustifiable risk that [a] material element exists") and *supra* note 130 (discussing the Model Penal Code's treatment of recklessness). But see GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW § 11, at 87 (1978) (explaining that because "[i]n relation to the future we never know for sure, . . . 'knowledge' in relation to the future must embrace knowledge of probability"; thus, "the notion of knowledge is capable of comprising recklessness, in the sense of knowledge of the risk").

134. See WILLIAMS, *supra* note 1, § 24, at 56 ("[A] judgment of recklessness uses the concept of the reasonable man only as a guide to what went on in the accused's mind, and only so long as it can plausibly be assumed that the accused's mind accorded with the normal at the time of his act."). But see *supra* note 21-28 and accompanying text (observing that proof of the subjective state of mind of knowledge under a "wilful ignorance" theory involves an objective assessment of what a reasonable person would know given the circumstances).

subjectively aware of the risk he faces, but the substantiality, unjustifiability, or possibility of the risk, whichever is required, is objectively measured. In contrast, once it is determined that an actor subjectively believed in the existence of the fact in question, knowledge may be found with no objective determination.¹³⁵

It is also important to note that knowledge involves a belief about the fact in question, but recklessness does not. One may be reckless if one is aware that a significant fact probably exists, regardless of whether one has any belief at all one way or the other about the existence of the fact.

In addition, one must have a correct belief to act knowingly, but one's belief need not be correct to act recklessly. To illustrate, consider the crime of receiving stolen merchandise. Suppose a police officer informs a merchant that a shipment of thirty purple trenchcoats has been stolen and that the thieves are trying to sell the merchandise in the local area. If the merchant does not believe the officer and is then approached by the thieves and agrees to purchase the coats, he could not be convicted of knowingly receiving stolen merchandise. He incorrectly did not believe that they were stolen. He might, however, be convicted of recklessly receiving stolen merchandise, despite his incorrect belief. Using the Model Penal Code definition of recklessness, he might have consciously disregarded a substantial and unjustifiable risk that the coats were stolen. The accuracy of his belief that the coats were not stolen would be irrelevant in determining whether he acted recklessly.

Finally, although one cannot know a future circumstance,¹³⁶ one may act recklessly with regard to a future circumstance. Suppose an individual dumps a barrel of old motor oil in a public reservoir, aware that the barrel will probably eventually leak and pollute the water. If the barrel does leak, the dumper could be responsible for having recklessly polluted the reservoir. Under the Model Penal Code definition of recklessness, at the time the individual acted, he was aware of and consciously disregarded a substantial and unjustifiable risk that, at some time in the future, the reservoir would become polluted as the result of his action. He would not, however, be guilty of having knowingly polluted the reservoir, at least under the definition of knowledge derived above. At the time he acted, he could not have known that his action would later result in the pollution. He might have believed that it would—even strongly believed that it

135. An objective determination of the existence of the fact might be needed, but an objective determination that the actor or some "reasonable person" should or should not have been aware would not be needed.

136. One might be said to have "contingent" knowledge of the future. *See supra* note 116 (noting that the Model Penal Code definition of knowledge includes "contingent" knowledge of the future). *But see* WILLIAMS, *supra* note 11, § 11, at 87 (describing knowledge of the future as knowledge of probabilities (as in the definition of recklessness) rather than as contingent knowledge).

would—but he could not have been certain. Some outside factor might have intervened to prevent the spill, such as an alert fisherman retrieving the barrel before it leaked. Thus, although one may not know a future fact, one may act recklessly with regard to it.

E. Comparing Definitions of Wilful Ignorance with Definitions of Knowledge and Recklessness

Most current definitions of wilful ignorance describe a hybrid mental state that is neither quite like knowledge nor quite like recklessness.¹³⁷

1. *Code-Based Definitions*—Given the above understandings of knowledge and recklessness, wilful ignorance as described in the Model Penal Code falls somewhere between the two on a continuum of certainty. All are different levels of awareness of the fact in question. Like both knowledge and recklessness, Code-based wilful ignorance requires a finding of a subjective awareness on the defendant's part: the defendant must be subjectively aware of a "high probability" of the fact in question.¹³⁸ If in order to "know" one must be aware of the certainty or near certainty of a fact,¹³⁹ and in order to be "reckless" one must be aware of, at most, the substantial probability of a fact,¹⁴⁰ the awareness of one who is aware of the high probability of a fact falls somewhere between the level of conviction required for knowledge and the one required for recklessness.¹⁴¹

137. It has been argued elsewhere that definitions of wilful ignorance sometimes describe a state of negligence and, most often, describe a state of recklessness. See Robbins, *supra* note 1, at 223-31 (observing that the Model Penal Code's definition of wilful ignorance as knowledge runs against the trend to define it in terms describing recklessness, but noting that some courts use instructions that allow the jury to find wilful ignorance when the defendant was merely negligent); see also Comment, *supra* note 10, at 477 (arguing that a wilful ignorance instruction failed to differentiate wilful ignorance from negligence and recklessness).

138. "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person *is aware* of a high probability of its existence . . ." MODEL PENAL CODE § 2.02(7) (emphasis added); see also *United States v. Jewell*, 532 F.2d 697, 707 (9th Cir.) (en banc) (Kennedy, J., dissenting) (noting that the Model Penal Code formulation of wilful ignorance requires subjective belief, *cert. denied*, 426 U.S. 951 (1976); Berkowitz, *supra* note 1, at 1089-91, 1099 (arguing that the Code's "high probability" language focuses the fact-finder on the defendant's subjective understanding of the circumstances).

139. See *supra* notes 104-05 and accompanying text.

140. See *supra* notes 124-30 and accompanying text.

141. "The original draft of this language . . . required only that there be a 'substantial probability' of the fact in existence. This was changed to 'high' probability in the view that 'substantial' did not imply a sufficient level of probability and weakened the distinction between knowledge and recklessness as modes of culpability." MODEL PENAL CODE § 2.02 cmt. 9 n.42; see also *United States v. Kallash*, 785 F.2d 26, 29 (2d Cir. 1986) (ruling that knowledge-like language of "actual belief is plainly a higher standard than the 'awareness of high probability' standard" derived from the Model Penal Code

It could be argued that wilful ignorance is more like recklessness in this respect than like knowledge, because the difference between a high probability and a substantial probability is only one of degree, while the difference between a high probability and a near certainty is a difference in kind. On the other hand, since certainty and probability are both degrees of certitude, it is more appropriate to envision them as points on the same spectrum. Empirically, however, as a lay jury might understand these terms, it seems that the difference between a substantial probability and a high probability is not that great, if it can be delineated at all, while the difference between a high probability and a practical certainty is much more significant. Therefore, if the accused must be aware of the substantiality of the risk he faces, or of factors making the risk substantial, in order to be reckless,¹⁴² this view would render Code-based formulations of wilful ignorance, at least in this particular regard, more like recklessness than knowledge.

In addition, like recklessness and unlike knowledge, Code-based wilful ignorance is measured by an objective as well as a subjective standard. A jury determining whether an actor was reckless makes an objective assessment whether the risk the actor consciously disregarded was substantial, unjustifiable, probable, possible, or whatever the governing definition of recklessness requires.¹⁴³ Likewise, a jury determining whether an actor was wilfully ignorant under the Model Penal Code formulation makes an objective assessment whether the risk he was aware of was highly probable.

Also, like recklessness and unlike knowledge, the Code-based definition of wilful ignorance does not require a belief one way or the other about the fact in question. A reckless actor may disregard his awareness of the probability of a fact without deciding whether or not he personally believes it to exist. Similarly, as long as a wilfully ignorant actor is aware of the high probability of a fact, he may act despite that fact without formulating a personal opinion as to whether or not it exists. This is not so for one who knows a fact; knowledge requires belief.¹⁴⁴

Although the Code's conception of wilful ignorance is like recklessness in that one need not have a belief about the fact in question, if one happens to have a belief, wilful ignorance becomes more like knowledge and less like recklessness. This occurs because a person may act recklessly even if he has an incorrect belief concerning the material fact,¹⁴⁵ but an

formulation of wilful ignorance).

142. See *supra* note 130.

143. See *supra* notes 124-28 and accompanying text.

144. See *supra* note 103 and accompanying text.

145. See *supra* subpart II(D).

incorrect belief negates both knowledge¹⁴⁶ and Code-based wilful ignorance.¹⁴⁷ An incorrect belief negates wilful ignorance because the Code's definition of wilful ignorance, by its very terms, indicates that a belief contrary to fact negates the state of mind.¹⁴⁸ In short, to "know" one must have a correct belief, to be "wilfully ignorant" (in this formulation) one may have no belief but may not have an incorrect belief, and to be "reckless" one's belief is irrelevant. In this regard, Code-based wilful ignorance seems to fall between knowledge and recklessness.

Under the Model Penal Code formulation of wilful ignorance, one cannot wilfully ignore a future circumstance. Wilful ignorance applies only to "the existence of a particular fact,"¹⁴⁹ and the commentary explains that the Code intentionally omits wilful ignorance of something that is "a matter of the future at the time of acting."¹⁵⁰ To illustrate, suppose an actor is aware of a high probability that if he dumps a barrel of oil in a reservoir it will later leak and eventually pollute the water. Under the Model Penal Code definition of wilful ignorance, if he disregards that probability and dumps the barrel anyway, he would not be considered wilfully ignorant of the fact that he was polluting the water because, at the time of his act, that fact did not yet exist. In this respect, then, Model Penal Code wilful ignorance is like knowledge and unlike recklessness: one cannot know the future, but one can act recklessly with respect to a future circumstance.¹⁵¹

146. See *supra* notes 108-14 and accompanying text.

147. Under the Code's formulation of wilful ignorance, if a person actually believes that the fact in question does not exist, he is not charged with "knowing" (or being wilfully ignorant of) that fact. MODEL PENAL CODE § 2.02(7). Thus, an incorrect belief (that the fact does not exist when in fact it does) negates Code-based wilful ignorance.

148. See *id.* ("[K]nowledge of the existence of a particular fact . . . is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." (emphasis added)); see also *id.* § 2.02 cmt. 9 ("The inference of 'knowledge' of an existing fact is usually drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief." (footnote omitted) (emphasis added)).

149. *Id.* § 2.02(7).

150. *Id.* § 2.02 cmt. 9; see also *United States v. Gurary*, 860 F.2d 521, 526 (2d Cir. 1988) (noting that the Model Penal Code comments "suggest that in general, conscious avoidance instructions are only appropriate where knowledge of an existing fact, and not knowledge of the result of defendant's conduct, is in question"), *cert. denied*, 490 U.S. 1035 (1989); WILLIAMS, *supra* note 11, § 6.3, at 126 ("[T]he doctrine of wilful blindness . . . is normally used in relation to circumstances and is inapposite to consequences.").

151. See text accompanying note 136 (illustrating that one may act recklessly with regard to a future event). Although logically one cannot know the future, the Model Penal Code permits a finding of knowledge of the result of one's conduct, see MODEL PENAL CODE § 2.02(2)(b)(ii), which would be knowledge of the future. See *supra* notes 115-16 and accompanying text. Using the example in the text, logically an individual could not know he would pollute at the time he dumped the barrel, but the Code would allow a finding that he polluted knowingly, if he were aware that it was "practically certain" his conduct would cause such a result. See MODEL PENAL CODE § 2.02(2)(b)(ii). In this respect, Code-based wilful ignorance may be like "logical" knowledge, but it is unlike Code-based

For all the foregoing reasons, Code-based descriptions of wilful ignorance delineate a state of mind somewhere between knowledge and recklessness. This mental state shares many significant attributes with recklessness, yet it has at least one critical characteristic in common with knowledge. It is, at the very least, troublesome that such a mental state is used as an overall knowledge equivalent.

Code-based wilful ignorance also is sufficiently unlike recklessness that, contrary to some suggestions, it should not be equated with recklessness. Professor Robbins, for example, proposes remedying the problem of the definitional inequivalence of knowledge and wilful ignorance by adding recklessness or wilful ignorance provisions, as a basis for conviction for particular crimes, to statutes that now require knowledge for conviction.¹⁵² He provides a sample statute covering drug importation, in which the crime may be committed knowingly or recklessly. "Recklessly" is defined as consciously disregarding a substantial risk, and "consciously disregard[ing] a substantial risk" is defined to include recognizing a high probability that the fact in question exists or that a certain result will be created, unless the actor actually believes that it does not exist or will not be created (a variant of Model Penal Code wilful ignorance that adds wilful ignorance as to a future event or circumstance).¹⁵³

There are several problems with this proposal. First, just as Code-based wilful ignorance is not quite knowledge, it is not quite recklessness either. Arguably, all Code-based wilful ignorance involves reckless behavior or a reckless state of mind, since it requires conscious risk taking. But, as explained earlier, Code-based wilful ignorance is a "higher" state than recklessness; that is, it entails an awareness of a higher level of risk that a certain fact exists or that a certain result will occur.¹⁵⁴ Conse-

knowledge. Therefore, the Code's formulation of wilful ignorance is unlike recklessness and unlike the Code's formulation of knowledge, yet like knowledge generally.

152. Robbins, *supra* note 1, at 233.

153. Robbins's proposed statute follows:

- (1) It shall be unlawful for any person knowingly or recklessly to import into the Customs territory of the United States any controlled substance without proper authorization [as described elsewhere].
- (2) One acts knowingly with respect to facts, conduct, attendant circumstances, or results if he is aware that such facts, circumstances, conduct, or results exist or will be created or if he is virtually certain that such facts, circumstances, conduct, or results exist or will be created.
- (3) One acts recklessly with respect to facts, attendant circumstances, conduct, or results if he consciously disregards a substantial risk that such facts, circumstances, conduct, or results exist or will be created.

One consciously disregards a substantial risk if he recognizes a high probability that such facts, circumstances, conduct, or results exist or will be created, unless he actually believes that they do not exist or will not be created.

Id. (footnote omitted).

154. See *supra* notes 138-41 and accompanying text.

quently, there may be reasons to punish wilfully ignorant behavior in situations in which we would not want to punish reckless behavior, just as there are situations in which we punish knowing behavior and not reckless behavior. Robbins's proposed statute does not appear to recognize this consideration.

Moreover, while all Code-based wilful ignorance may amount to some form of recklessness, not all recklessness amounts to wilful ignorance or is as culpable as wilful ignorance. Yet Robbins's proposal, by first equating wilful ignorance with recklessness and then treating all recklessness as he would have us treat wilful ignorance, effectively renders *all* recklessness as culpable as wilful ignorance. Hence, a proposal that solves the problem of equating wilful ignorance with knowledge by equating wilful ignorance with recklessness, and then stretching knowledge-level crimes to include not only wilful ignorance but also recklessness, seems a bit of overkill.

Finally, the Code's "balancing" provision, included in Robbins's proposal, appears ill-suited to a statute like his in which recklessness is a culpable mental state. Even if an actor actually believes, incorrectly, that a certain fact does not exist or a certain result will not occur, if he consciously disregards a substantial risk that the fact exists or that the result will occur, he is nevertheless reckless. Why *exculpate* one who actually believes the contrary if he recognizes a high probability of the fact, as Robbins's "balancing" language does, but *inculpate* one who actually believes the contrary if he merely recognizes a substantial risk of the fact, as Robbins's proposal also does?¹⁵⁵

Despite these criticisms, using Code-based wilful ignorance to satisfy a required mens rea of recklessness is less troublesome than using it to satisfy knowledge because recklessness is usually a less culpable mental state than this type of wilful ignorance.¹⁵⁶ Therefore, it will normally be permissible to convict one of a crime requiring the lesser state

155. Perkins and Boyce also propose a variant of the Model Penal Code formulation of wilful ignorance, which describes a state somewhat like but somewhat more demanding than recklessness:

Whenever knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person believes that it probably exists. And one is deemed to have knowledge of what he would have known if he had not deliberately avoided knowing. Deliberate avoidance of knowledge may be established by direct proof, or by proof that a person is aware of a high probability of the existence of the fact unless he actually believes that it does not exist.

PERKINS & BOYCE, *supra* note 1, at 875. This particular definition is appealing in part owing to its simplicity, and in part because it incorporates some of the considerations contained in this Article's suggested definition of wilful ignorance, such as the actor's belief as to the fact in question and stress on the deliberateness of the actor's avoidance of actual knowledge. *Id.* Yet it is still unsatisfactory, for reasons discussed throughout this Article.

156. See *infra* subpart III(D).

of recklessness based on a finding of the higher, more culpable state of Code-based wilful ignorance.¹⁵⁷

2. *Recklessness-Based Definitions*—When wilful ignorance is defined only as reckless disregard of or indifference to the truth, it necessarily describes a state of recklessness and is therefore not like knowledge.¹⁵⁸ If other means of establishing wilful ignorance are included in such a charge as alternatives to reckless disregard,¹⁵⁹ the effect is to reduce the mens rea requirement to the lowest of the mental states described.¹⁶⁰ Wilfulness¹⁶¹ or purposefulness is usually considered a more culpable mens rea than recklessness.¹⁶² Consequently, when definitions of wilful ignorance include recklessness-based language and, as an alternative, wilfulness-based language, the resulting mens rea is still recklessness. Because recklessness is not knowledge, definitions of wilful ignorance using recklessness-based language alone or as an alternative to

157. The Code, like the law generally, provides for conviction based either on the mental state required by a statute, or on any mental state graded as more culpable than the one required by the statute. See MODEL PENAL CODE § 2.02(5); see also *id.* § 2.02 cmt. 7 (observing that the Code's provision makes it necessary to articulate only the minimum basis of liability in drafting specific offenses for more serious bases to be implied).

158. A line of Ninth Circuit cases indicates that reckless disregard for the truth is neither knowledge nor enough to establish wilful ignorance. See, e.g., *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985) (holding that a wilful ignorance instruction may not be given when the defendant "was mistaken, recklessly disregarded the truth, or negligently failed to inquire"); *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984) ("The Government may not carry its burden by demonstrating that the defendant was mistaken, recklessly disregarded the truth, or was negligent in failing to inquire." (citations omitted)), *cert. denied*, 474 U.S. 829 (1985); *United States v. Williams*, 685 F.2d 319, 321 (9th Cir. 1982) ("Although conscious avoidance of the truth may constitute knowing conduct, reckless conduct alone is not sufficient." (citations omitted)); *United States v. Jewell*, 532 F.2d 697, 704 n.21 (9th Cir.) (en banc) (approving an instruction that did not allow a conviction on a finding of reckless disregard, mistake, or negligent failure to inquire), *cert. denied*, 426 U.S. 951 (1976); cf. *United States v. Suttiswad*, 696 F.2d 645, 652 (9th Cir. 1982) (noting that a deliberate ignorance instruction "is properly given only when a defendant claims a lack of guilty knowledge, and there are facts which point in the direction of deliberate ignorance").

159. See *supra* notes 84-85.

160. If one may commit a crime purposefully, knowingly, or recklessly, the minimum culpable mental state for commission of the offense is the least culpable of the specified states—that is, recklessness. Likewise, if alternative formulations of wilful ignorance are used in a jury instruction, the least culpable of those formulations becomes the minimum requirement sufficient for finding wilful ignorance. But see *United States v. Sarantos*, 455 F.2d 877, 882 (2d Cir. 1972) (ruling that "[t]he phrases 'reckless disregard of whether the statements made were true' and 'conscious purpose to avoid learning the truth' mean essentially the same thing").

161. See MODEL PENAL CODE § 2.02(8) & cmt. 10 (indicating that "wilfully" is satisfied by "purposefully" and sometimes by "knowingly").

162. See, e.g., *id.* § 2.02(2),(5) & cmt. 7 (essentially grading culpable mental states, with "purposefully" listed as more culpable than "knowingly," and "knowingly" as more culpable than "recklessly"); see also LAFAYE & SCOTT, *supra* note 32, § 3.7(g), at 240 ("Subjective fault is greater fault than objective fault; one who consciously does risky things is morally a worse person than one who unconsciously creates risk.").

wilfulness-based language describe a state of mind that is not knowledge and should not be used to satisfy a knowledge requirement. However, these definitions are recklessness equivalents and may appropriately be used when the mens rea required for the commission of a crime is recklessness.

On occasion, jury charges indicate that both recklessness-based and wilfulness-based factors must be present to establish wilful ignorance.¹⁶³ Juries are thereby instructed, in effect, that they must find that the defendant avoided or ignored the truth both recklessly and wilfully.¹⁶⁴ Under such instructions, there must still be a finding of the higher mental state of wilful or purposeful avoidance. Hence, these instructions will be considered in the next section, under wilfulness-based definitions.

Recklessness-based definitions may also be mixed with Model Penal Code language. Code-type language results in a definition of wilful ignorance that falls somewhere on the spectrum between recklessness and knowledge. When recklessness language and Code-type language are included in a charge as alternative means of establishing wilful ignorance, the lowest common denominator becomes recklessness, and the charge should be viewed, as above, as a recklessness-based charge. On the other hand, when a jury instruction indicates that both recklessness and Code-type factors are necessary to establish wilful ignorance, the charge rises to the level of the higher of the two requirements and operates like a Code-level charge. Since Code-based definitions of the doctrine describe a state of mind somewhere between knowledge and recklessness,¹⁶⁵ the conjunctively mixed Code and recklessness formulations may fairly satisfy a required mens rea of recklessness, but are troublesome when used to satisfy a required mens rea of knowledge.

3. *Wilfulness-Based Definitions*—Charges that clearly convey the notion that an individual is wilfully ignorant because he purposefully or intentionally avoided knowledge of the fact in question are wilfulness-based. They imply that the individual was successful in avoiding positive knowledge and hence did not actually know. Indeed, any definition of wilful ignorance in which the construct is used for a purpose other than as evidence from which to infer actual knowledge,¹⁶⁶ or as pretended ignorance,¹⁶⁷ implies true ignorance. By definition, then, wilfulness-based formulations of wilful ignorance do not describe a state of mind that is the equivalent of actual knowledge. Whether they describe a state close to knowledge is a question that requires further analysis.

163. See *supra* notes 82 and 86.

164. Such an instruction may be confusing to jurors: the defendant either did one or the other.

165. See *supra* section II(E)(1).

166. See *supra* notes 18-20 and accompanying text.

167. See *supra* note 48 and accompanying text.

Asserting that an individual purposefully avoided knowledge does not indicate the actual level of probability of the fact avoided, nor the level of probability of which the individual was personally aware. A person could intentionally avoid knowledge of a fact that is highly probable—and that he recognizes to be so—but could just as readily intentionally avoid knowledge of a fact that is merely possible. Thus, it is not feasible to determine from wilfulness-based language alone whether what one must be aware of is more like what one must be aware of to act knowingly, or more like what one must be aware of to act recklessly.

In fact, wilfulness-based language alone does not specifically indicate that one must be subjectively aware of anything at all¹⁶⁸ and implies, at most, that one be aware of only the remotest possibility of the fact in question. For example, a pawnbroker could decide that he never wants to know whether any of the hundreds of people who pawn items in his shop each month are dealing with stolen merchandise, and he could form a conscious, deliberate intention to avoid finding out in every instance. He probably would not have formed such an intention unless he recognized at least a remote possibility that people would pawn stolen goods. But, in each individual transaction, he may not personally be aware of any more than a remote possibility that the particular item being pawned is stolen. Nevertheless, he could deliberately avoid learning whether or not it is stolen, despite his lack of subjective awareness of a probability that the merchandise is “hot.” In this respect, then, pure wilfulness-based descriptions depict a mental state that is unlike knowledge and even unlike most formulations of recklessness, which require subjective awareness that the fact avoided is more than a remote possibility.

Wilfulness-based definitions do not require a belief about the fact in question. As the individual need not subjectively be more than remotely aware of the fact, he also need not form a belief as to whether or not it exists. In this respect, wilfulness-based definitions describe a mental state resembling recklessness and not knowledge.

Finally, a person cannot deliberately avoid learning the truth of some matter that has not yet occurred or does not yet exist. In other words, one cannot purposefully avoid knowing a future fact, such as the result of one’s conduct. For example, using the pollution hypothetical

168. Many wilfulness-based instructions include language that arguably implies that the person involved had some awareness of the fact at issue. For example, a typical instruction might state that a person is charged with knowing if he “deliberately closed his eyes to what would otherwise have been obvious to him.” See *supra* note 94 and accompanying text. It is not entirely clear whether such an individual actually was aware of the obvious, or whether he only should have been aware. The difference is significant because the former renders the charge more like knowledge or recklessness and the latter renders the charge more like negligence.

above,¹⁶⁹ suppose an individual dumps in the reservoir a barrel of oil that leaks two years later and pollutes the water. At the time he acts, he cannot deliberately avoid finding out whether he is polluting the water, because the barrel has not yet leaked, and he is not yet polluting the water. He may deliberately avoid learning whether there is a risk that in the future his present action may result in polluting the water, but he cannot deliberately avoid learning the *fact* of pollution because that has not yet occurred. In this respect wilfulness-based definitions describe a mental state more like knowledge than recklessness, because one cannot know the future but may act recklessly with regard to a future event.

Thus, like Code-based notions of wilful ignorance, wilfulness-based definitions describe a hybrid mental state that is neither quite like knowledge nor quite like recklessness. When wilfulness language is mixed with Code-based language, and the two are included as alternative means of establishing wilful ignorance, the resulting common denominator or lowest mental state is still one or the other hybrid concept. Neither is quite like knowledge. When wilfulness language is added to Code-based language and both are required to establish wilful ignorance, the result is to add some additional knowledge-like factors and some additional recklessness-like factors to what is already a hybrid concept, resulting in just another hybrid. Again, neither is knowledge. In short, wilfulness-based descriptions, whether alone or in any combination with Code-based definitions, describe a mental state that is lower than knowledge, higher than recklessness, and not quite the same as either.

F. *Limits of Definitional Analysis*

To summarize, with the exception of pure recklessness-based definitions and those that include recklessness-based formulations as an alternative to some other formulation (both of which now occur infrequently), most definitions of wilful ignorance delineate a mens rea that is the equivalent neither of knowledge nor recklessness. More significant than this definitional inequivalence, however, is the issue of moral equivalence.¹⁷⁰ How bad is it to be wilfully ignorant? Is it as bad as actually

169. See *supra* subpart II(E).

170. Those who advance the view that wilful ignorance may fulfill a statutory requirement of knowledge appear to assume, usually without discussion, that the two concepts are morally equivalent. See, e.g., *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.) (en banc) ("The substantive justification for the rule [that wilful ignorance is deemed to be knowledge] is that deliberate ignorance and positive knowledge are equally culpable."), *cert. denied*, 426 U.S. 951 (1976); Perkins, *supra* note 1, at 961 ("Without doubt it was the fact that [actual knowledge and wilful ignorance] were regarded as equally culpable which caused both to be included under the term 'knowledge.'"); see also LAFAYE & SCOTT, *supra* note 32, § 3.5(b), at 219 ("The notion that [wilful ignorance] is properly classified as knowledge in the hierarchy of mental states is grounded in the conclusion 'that deliberate ignorance and positive knowledge are equally culpable.'" (quoting *Jewell*, 532 F.2d at 700)).

knowing? Does the assessment change when other factors, such as the nature of the crime involved or the elements used to define wilful ignorance, change? These critical issues of culpability must be addressed if the problem of wilful ignorance is to be resolved satisfactorily.

The analysis thus far assumes, as do the Model Penal Code and most penal codifications, that knowledge is usually more culpable than recklessness.¹⁷¹ The analysis impliedly also assumes that something described as a state between knowledge and recklessness will be culpable at a level between the two. The following Part examines whether these assumptions are accurate and their ramifications for the proper treatment of wilful ignorance in criminal law.

III. Comparative Culpability

Current definitions of wilful ignorance do not describe a state of mind that is always as culpable as knowledge. Hence, they should not be considered sufficient in all instances to satisfy an otherwise required mens rea of knowledge. To demonstrate this proposition, it is necessary first to examine the relative culpability¹⁷² of various traditional mental states, specifically purposefulness, knowledge, and recklessness.

A. *The Culpability of Purposefulness, Knowledge, and Recklessness*

Generally, in a very liberal sense of the term, it is thought that purposefulness is more culpable than knowledge and that knowledge is more culpable than recklessness.¹⁷³ Purposefulness, for example under

171. *But cf.* Symposium, *infra* note 173.

172. Although treatises on criminal law often use the term "culpability" as though it has some fixed or commonly understood meaning, it should be noted at the outset that the term is ambiguous and is used in this context as a term of art. Even when used as a term of art, it often remains ambiguous. For example, behavior is usually considered "culpable" in criminal law because the individual engaging in the behavior has enough of an awareness of the nature and significance of what he is doing to be capable of consciously deciding whether or not to avoid engaging in the behavior. Thus, one is culpable because one makes a conscious moral choice. Yet, even this equivocal attempt at a definition is not quite accurate enough clearly to cover some situations considered "culpable," such as instances of criminal negligence, in which the actor is not but should be aware of the moral significance of what he is doing.

173. *See supra* note 162 and accompanying text. *But cf.* Symposium, *Model Penal Code Conference Transcript—Discussion Two*, 19 *RUTGERS L.J.* 635, 639-40 (1988) (remarks of Professor Zimring) (cautioning that the Code's mens rea grading categories do not operate "in a disembodied way," so that, for example, knowingly doing anything is not necessarily always less culpable than purposely doing the same thing; thus, even the same term describing a mental element in two different statutes does not necessarily imply the same gradation of blameworthiness or quantity of harm). Although not discussed in this Part, it is useful to observe that recklessness, based on subjective awareness of risk, is usually considered more culpable than negligence, which is based on objective risk. This probably stems from the assumption that "[s]ubjective fault is greater fault than objective fault; one who consciously does risky things is morally a worse person than one who unconsciously creates risk." *LAFAYE & SCOTT, supra* note 32, § 3.7(g), at 240.

the Model Penal Code's definition,¹⁷⁴ includes knowledge, but it also includes the additional element of purpose, aim, or desire.¹⁷⁵ Under this view of purposefulness, it is often considered worse to desire that a particular fact exist or that a particular result occur than simply to know that it exists or will occur.

Take the example of an adult who commits statutory rape by having intercourse with a thirteen-year old.¹⁷⁶ One who acts purposefully with regard to the element of the child's age, under the above definition of purposefulness, has it as his conscious object to have intercourse with a child; one who acts knowingly with regard to the age element does not necessarily desire to have intercourse with a minor, but knows that he is having sex with someone underage. In other words, the knowing actor may be indifferent as to the age of his partner, while the purposeful actor is not. It may be considered more depraved actually to *want* to have sex with a child than just to *know* that is what one is doing. An adult who not only knowingly has sex with a child but who actually desires to do so often may appear more evil and more morally blameworthy.¹⁷⁷ In instances

174. The Model Penal Code provides:

A person acts purposefully with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

MODEL PENAL CODE § 2.02(2)(a).

175. Comments to the Code imply that purposefulness encompasses knowledge but that it also entails an additional requirement. *See id.* § 2.02 cmt. 2 (stating that, while "[k]nowledge . . . is a common element" in acting both purposely and knowingly, an actor does not act purposely "unless it was his conscious object to perform an action of that nature or to cause such a result"). However, the language used in the Code itself does not clearly indicate that knowledge is necessarily required in order to find purposefulness. For example, under § 2.02(2)(a)(i), purposefulness as to the nature or result of one's conduct requires that one have it as his conscious object to engage in conduct of that nature or to cause such a result, but does not appear to require that he be aware—know, per § 2.02(2)(b)(i)—that his conduct is of such a nature or that he be practically certain—know, per § 2.02(2)(b)(ii)—that he will cause such a result. Additionally, § 2.02(a)(ii) allows for acting purposefully with regard to an attendant circumstance if one is aware of the existence of the circumstance (knowledge, per § 2.02(b)(i)), but also if one merely believes (possibly also knowledge) or even if one only hopes (not knowledge under any Code definition) that such a circumstance exists.

176. Statutory rape is often a strict liability offense with regard to the element of the victim's age. That is, an individual is usually guilty of this offense whether or not he or she was aware or even should have been aware that the victim was under the statutory age. *See* W.E. Shipley, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R.3d 1100, 1102-05 (1966 & Supp. 1991). Nevertheless, one may commit the crime with any of several different *mens rea*.

177. Arguably, the purposeful statutory rapist is also more in need of rehabilitation than the knowing statutory rapist. Rehabilitation is not stressed in this analysis in part because it is not presently considered one of the more important justifications for criminal punishment. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 38, 40 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221, 3223 (noting that the federal sentencing system was based on the "outmoded rehabilitation model" that recent studies

like this, the purposeful action may be characterized by "maliciousness" or "viciousness," while the knowing action may be characterized by "callousness."¹⁷⁸ Maliciousness and viciousness are probably just more aggressively ruthless forms of callousness, but for that very reason they often seem more evil and more blameworthy.¹⁷⁹

A malevolent person, who desires the disagreeable result, may also appear to be more dangerous to society¹⁸⁰ than a callous individual, who is indifferent to the result, but this is often an illusion. Consider the same statutory rape example. Wrongdoer *A* might knowingly have sex with a child because he is attracted to the individual, without particularly desiring that the object of his affections be a youngster. On the other hand, *B*, who purposefully commits statutory rape, would have a particular aim or desire to have sex with a child. Although *B* would not necessarily be any more likely than *A* to commit the crime with a particular child, at first glance it seems that *B* might be more likely to repeat the crime in the future with a different minor. *A* would repeat the offense with someone else only if he happened to be attracted to another person who was underage, while *B* might be desirous of having sex with any youth. Nevertheless, *B* is not necessarily more dangerous than *A*. *A* may repeatedly commit the offense with the particular child to whom he is attracted, or he may work with minors and thus frequently come in contact with youths to whom he becomes attracted. On the other hand, *B* may have an urge to have sex with a child only once, or never meet children, or decide he does not like it and never again look for other children with whom to have intercourse. Consequently, we cannot assume that all malicious statutory rapists pose a greater danger to society in the long run than all callous statutory rapists. Nevertheless, if one is to generalize, it seems that in most instances the malicious statutory rapist would be more likely to repeat his crime than the callous statutory rapist. Because the malicious rapist is specifically desirous of committing the particular act, he will generally be more likely to repeat such an act than one who knows what he is doing but is not especially aiming to do so. Thus, to the extent purposeful behavior is considered more criminally culpable than knowing behavior, the distinction probably rests both on the perception of an elevated level of danger and on

suggest "has failed" and "is not an appropriate basis for sentencing decisions").

178. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 694 (1983).

179. *See id.* But see WILLIAMS, *supra* note 1, § 18, at 38-42 (questioning the validity of a distinction between the culpability of knowledge and purpose in certain circumstances); Williams, *supra* note 100, at 196 ("Foresight of the certainty of a consequence resulting from one's conduct is equivalent in law to desire of the consequence.").

180. Dangerousness might indicate the need for incapacitation and specific deterrence of the individual wrongdoer and may also implicate a desire to punish this particular individual as a means of deterring others from committing the same crime.

the perception of greater moral blameworthiness generally associated with desiring a bad result than with simply not caring whether or not a bad result occurs.

In order to understand why knowledge is usually viewed as more criminally culpable than recklessness, an illustration distinguishing these concepts may be helpful. If perfect knowledge were possible, we might envision the knowing mind as a 100-piece jigsaw puzzle with all the pieces in place, each piece representing a degree of awareness of some fact or state of affairs. Since perfect knowledge is not possible, the next best thing, which we commonly call a knowing mind but which is more like a state of near certainty than absolute certainty,¹⁸¹ would be analogous to a puzzle with one or two pieces missing. Following the Model Penal Code definition, a reckless mind (one that is aware of circumstances that make a fact substantially probable)¹⁸² might be a puzzle missing fifteen or so of its pieces.

To translate this picture into words, suppose two individuals receive stolen goods, one practically certain that they are stolen and the other aware of factors making it substantially probable that they are stolen. The first is missing one piece of the puzzle that, if complete, would indicate he knows the goods are stolen, and the second is missing fifteen out of the hundred pieces of the puzzle representing relevant awareness. The crime of receiving stolen goods usually requires that the actor know the goods are stolen, reflecting a legislative judgment that it is significantly worse to be practically certain of the theft (to have ninety-nine pieces) than to be aware of information making the theft substantially probable (to have eighty-five pieces). Thus, each actor is aware of some possibility that the goods are tainted, and his level of certitude bears a direct relationship to his consequent criminal culpability.

This makes sense. The more pieces of the puzzle one has, the more certain he is that some significant fact exists that will make his conduct criminal, and the more blameworthy he is if he goes ahead and acts despite his awareness of that fact. To put it another way, the greater one's certitude, the more callous one is assumed to be in disregarding the fact.¹⁸³ At some point, the callousness reaches a level where the conduct

181. See *supra* note 105 and accompanying text.

182. Neither the Code's definition of recklessness, nor other definitions of the term, necessarily require that the actor be aware of a substantial probability that the fact in question exists or will occur, or even that he be aware of circumstances that make the fact substantially probable. See *supra* notes 124-30 and accompanying text. However, for purposes of this discussion, it is too cumbersome to examine every possible definition of recklessness and then compare each with every possible definition of wilful ignorance. Hence, for the textual comparison, this Article uses the above-described understanding of the Model Penal Code definition, derived *supra* note 130, unless otherwise noted.

183. Neither actor's conduct would reach the level of malicious or vicious in this instance, as neither acted with a particular purpose or aim to receive stolen goods. See *supra* notes 177-79 and accompanying text.

becomes sufficiently blameworthy to be criminal. In the stolen goods example, the legislature has determined the level to fall somewhere above recklessness (eighty-five pieces) and to include knowledge (ninety-nine pieces).

It may also be argued, although less conclusively, that the knowing actor poses a greater danger to the populace than the reckless actor.¹⁸⁴ We do not know whether the reckless actor would have gone ahead and received the stolen goods had he been more certain that they were stolen. Maybe he would have, but maybe the greater degree of certainty would have deterred him. On the other hand, the knowing actor has confirmed that he is willing to take on what he is sure are stolen goods; he has proven that he will not be deterred by the certainty that he is promoting criminal activity. This means not only that he is more depraved in this regard, but also, to generalize, that he is more likely to commit such crimes than the reckless actor if faced with similar opportunity.

Also, given that the knowing actor is more certain of the fact that makes his conduct illegal, his action in the face of that certainty is more deliberately criminal. The more aware he is and the more awareness he therefore disregards in acting, the more calculated is his action. One who acts in a more calculatedly and deliberately criminal fashion is usually more blameworthy and, generally, more likely to be dangerous.

B. The Culpability of Code-Based Wilful Ignorance

Code-based wilful ignorance is not as culpable as knowledge. Consequently, Code-based formulations of wilful ignorance should not be used as blanket substitutes for knowledge. Rather, if a Code-based definition of wilful ignorance is used, legislative assessments should be made on a crime-by-crime basis to determine whether wilful ignorance should suffice for each crime for which knowledge is currently required.

184. Despite the argument that follows in the text, there may be instances in which a reckless actor is more dangerous to society than a knowing actor in similar circumstances. For example, suppose *A* and *B* operate international shipping companies. *C*, a customer of both, exports a shipment of oriental rugs each week with *A* and with *B*. *A* and *B* both know that *C* has a reputation as a major drug dealer, and that he has been investigated by local law enforcement authorities for smuggling cocaine abroad. *A* and *B* also both know that cocaine is often smuggled by rolling up packages containing the drug into oriental rugs that are exported all over the world. *C* has told *A* that he will be sending a 20 kilo shipment of cocaine in the first of his weekly rug shipments each month, but he has not told *B* anything. *A* would therefore "know" (be practically certain) that he was aiding in exporting 20 kilos of cocaine each month. *B*, on the other hand, would not "know," but might be taking a substantial and unjustifiable risk that he is exporting drugs, and he might even be aware of the substantiality and unjustifiability of the risk he is taking. Because *B* does not know specifically when drug shipments are being made, he would be taking a risk that every one of *C*'s shipments contain drugs, rather than only the first shipment out of every four or five each month. Hence, *B*, though only reckless, might well be more dangerous than *A*, because he could be responsible for aiding in exporting a much larger quantity of drugs.

Code-based formulations of wilful ignorance fit neatly into the knowledge-versus-recklessness scheme of culpability. Returning to the puzzle example, the mind of such a wilfully ignorant individual may be analogized to a puzzle with ten of its pieces missing.¹⁸⁵ On the certitude continuum, considering a fact to be highly probable falls somewhere between considering it virtually certain and recognizing facts that make it substantially probable.¹⁸⁶ If one acts on such an awareness, then one is morally blameworthy at that same point between the knowing and the reckless actor, because one exhibits a level of callousness at a comparable point between the other two actors. Likewise, the danger posed by the wilfully ignorant actor falls somewhere between that of the knowing actor, who will surely act in the face of knowledge of illegality, and the reckless actor, who might not act if he were more certain of the illegality. The wilfully ignorant actor would probably be more likely to act in the face of knowledge than the reckless actor, because he has already shown himself to be willing to act on a greater awareness (ninety puzzle pieces), but we still do not know if he would be deterred by positive knowledge of illegality.

Therefore, just as the question of where to draw the criminal culpability line between knowledge and recklessness becomes a legislative, crime-by-crime determination,¹⁸⁷ so, too, should the question of where to fit Code-based definitions of wilful ignorance into the existing criminal framework. The very same considerations apply to the resolution of these two issues. Whatever factors prompt lawmakers to decide that the crime of receipt of stolen goods requires knowledge that the goods are stolen,¹⁸⁸ but that the crime of assault requires only that one recklessly inflict bodily injury,¹⁸⁹ or that assaults committed knowingly and recklessly are to be punished differently,¹⁹⁰ should be the same factors used to determine

185. Note that the arbitrary numbers used in the textual illustration render Code-based definitions of wilful ignorance closer to recklessness than knowledge. This reflects my opinion that the difference between an awareness of circumstances that render a fact substantially probable and an awareness of a high probability of that fact is not as great as the difference between awareness of a high probability and a practical certainty. See *supra* note 142 and accompanying text.

186. See *supra* section II(E)(1).

187. For a sample of the type of deliberation engaged in when legislatures decide whether to adopt knowledge or recklessness as the applicable mens rea for a particular offense, see the discussion of which mens rea ought to be adopted by state legislatures for violation of environmental protection laws concerning hazardous waste in Judith Ianello, Note, *Lessening the Mens Rea Requirement for Hazardous Waste Violations*, 16 VT. L. REV. 419 (1991).

188. See, e.g., 18 U.S.C. § 2315 (1988); N.Y. PENAL LAW §§ 165.40, 165.45, 165.50, 165.52, 165.54 (McKinney 1988 & Supp. 1992). But see ILL. ANN. STAT. ch. 38, para. 16-1(4) (Smith-Hurd Supp. 1992) ("A person commits theft when he knowingly . . . [o]btains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen . . .").

189. See, e.g., ARIZ. REV. STAT. ANN. § 13-1203 (1989); ME. REV. STAT. ANN. tit. 17-A, § 207(1) (West 1983); N.Y. PENAL LAW § 120.00(2) (McKinney 1987).

190. See, e.g., ALA. CODE §§ 13A-6-20(a), -21(a)(3) (1982) (classifying as first-degree assault

whether Code-based wilful ignorance may suffice as a culpable mens rea for receipt of stolen goods, or for some particular level of punishment for a graded offense.

In addition, legislatures should assess the role of Code-based wilful ignorance in defining crimes just as they assess the roles of knowledge and recklessness in such definitions.¹⁹¹ It is no more reasonable to assume that this form of wilful ignorance should always be considered as culpable as knowledge than it is to assume that recklessness should always be as culpable as knowledge.¹⁹² No criminal codification equates recklessness with knowledge for all purposes. By the same token, it is particularly unsatisfactory that the Model Penal Code gives wilful ignorance precisely this kind of blanket treatment, assuming that it is always as culpable as knowledge.

C. *The Culpability of Recklessness-Based Wilful Ignorance*

Reckless wilful ignorance¹⁹³ is a form of reckless behavior.¹⁹⁴ When one acts in reckless disregard of a fact or with reckless indifference to it, one acts recklessly. Since this form of wilful ignorance is recklessness, it is as culpable as recklessness. Therefore, from a culpability standpoint, recklessness-based formulations of wilful ignorance should be used only to satisfy a mens rea of recklessness. They should not be equated with or held to satisfy a mens rea of knowledge, because they do not describe a state comparable in culpability to knowledge.

D. *The Culpability of Wilfulness-Based Wilful Ignorance*

Most case law descriptions of wilful ignorance, from the earliest to the most recent, contain at least one other factor not mentioned in the

the intentional causation of serious physical injury by means of a deadly weapon or a dangerous instrument, and as second-degree assault the reckless causation of the same injury by the same means); KY. REV. STAT. ANN. § 508.020(1)(b), .030(1)(b) (Michie/Bobbs-Merrill 1985) (classifying as second-degree assault the intentional causation of physical injury by means of a deadly weapon or a dangerous instrument and as fourth-degree assault the reckless causation of the same injury by the same means).

191. It is beyond the scope of this Article to predict how such deliberations ought to turn out for every category of crime. In Part VI these principles are applied to a sample situation—drug importation.

192. In fact, it seems more reasonable to assume that Code-based wilful ignorance should be treated as culpably comparable to recklessness and not to knowledge, if one believes that Code-based definitions of wilful ignorance describe a state that is more like recklessness than knowledge. See Robbins, *supra* note 1, at 233.

193. The phrase “reckless wilful ignorance” seems to contain a contradiction in terms. How can something be both reckless and wilful at the same time? The contradiction may not always actually exist, however, because wilful behavior is often also reckless. For example, one who wilfully or deliberately endangers others by shooting a gun into a crowd of people is often sufficiently aware of the risk of endangering others that he also acts recklessly.

194. See discussion *supra* section II(E)(2).

Code's formulation—purposefulness.¹⁹⁵ These formulations require that the actor wilfully, deliberately, intentionally, or purposefully have avoided knowledge of the fact in question. This additional component of purposefulness is especially important,¹⁹⁶ because it alters the culpability of the state of mind described.¹⁹⁷

The Code does not mention this factor.¹⁹⁸ It seems to assume that this very basic element of wilful ignorance—the wilfulness of the ignorance—is impliedly subsumed by the individual's acting despite awareness of a high probability of illegality.¹⁹⁹ In other words, if one is aware of the high probability of a fact and nonetheless acts, one presumably has wilfully ignored that fact. This assumption is not warranted. When an individual is aware that a fact that would render his conduct criminal is likely to exist, and he engages in the conduct without first ascertaining for sure whether the fact exists, we may infer that he avoided positive knowledge. But his avoidance would not necessarily be purposeful; it might, for instance, be negligent or careless. He would not necessarily have a specific desire or aim to avoid actual knowledge. His aim might have been to act hurriedly, without taking the time to check further on a material fact.

For example, suppose a tobacconist is fully aware that thieves often try to sell stolen cigarettes at reduced rates, and he is approached by an

195. See *supra* notes 87-98 and accompanying text.

196. Cf. *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990) ("The key aspect of deliberate ignorance is the *conscious* action of the defendant—the defendant *consciously* attempted to escape confirmation of conditions or events he strongly suspected to exist. . . . [D]eliberate ignorance is reflected in a criminal defendant's actions which suggest, in effect, 'Don't tell me, I don't want to know.'" (emphasis in original) (quoting *United States v. de Luna*, 815 F.2d 301, 302 (5th Cir. 1987))).

197. See Richard Delgado, *Active Rationality in Judicial Review*, 64 MINN. L. REV. 467, 481 (1980) (finding that the criminal law doctrine of wilful ignorance "demonstrate[s] that when knowledge of certain facts establishes culpability, the deliberate refusal to acquire such knowledge, despite second-order evidence of its existence, may itself be culpable").

198. Some courts criticize the absence of the element of deliberateness in the Model Penal Code's definition of wilful ignorance. See, e.g., *United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir.) (stating that the conscious avoidance language would often be more useful to the jury than the Code formulation, which might be improper if used alone), *cert. denied*, 414 U.S. 821 (1973); cf. *United States v. Lanza*, 790 F.2d 1015, 1023-24 (2d Cir.) (noting that reliance upon the language of the Model Penal Code "may confuse and ultimately mislead the jury" (citations omitted)), *cert. denied*, 479 U.S. 861 (1986).

Despite development of the Model Penal Code in 1963, virtually no court has adopted the Code-based formula by itself to describe wilful ignorance. Courts continue to include the wilful aspect of wilful ignorance in their descriptions of the concept. It may be that judges recognize—at least intuitively if not expressly—that the behavior involved in avoiding knowledge is not sufficiently culpable to warrant the same criminal sanction as knowledge unless it is at the very least deliberate.

199. The Model Penal Code gives no explanation for not stressing the traditional and widely cited element of the wilfulness or purposefulness of the actor's ignorance. Indeed, the Code defines wilful ignorance by leaving out the wilfulness of the ignorance.

individual who offers to sell him a shipment of cigarettes at a rate significantly lower than that charged by his usual wholesale suppliers. In other words, assume he is aware of a high probability that the thieves are selling stolen cigarettes. If he buys the cigarettes despite this awareness, he has impliedly avoided finding out for sure whether they are stolen. But his action in avoiding positive knowledge is not necessarily purposeful. He may have avoided knowledge because he suspected illegality and deliberately decided it was better not to know. On the other hand, he may have failed to check on the merchandise because he was careless or lazy, or because he was preoccupied with personal problems and not focusing on what he was doing that day, or because he was in a terrible hurry to close his shop and thought a purchase was the fastest way to get rid of the cigarette purveyors, or because he was naïve enough to conclude that, despite the high probability of illegality, thieves would not hawk their wares in such a blatant fashion.

Thus, wilfulness-based definitions of wilful ignorance include an element of purposefulness that distinguishes wilful ignorance from exclusively risk-defined conduct, such as recklessness or Code-based wilful ignorance. This added element of purposefulness is crucial because it often renders the same overt conduct more culpable. For reasons discussed earlier,²⁰⁰ more purposeful conduct is usually more morally blameworthy. To illustrate, compare two individuals, both of whom are aware that a fact is likely to exist that makes their conduct criminal and both of whom go ahead and act without confirming whether or not the fact exists. The first intentionally fails to confirm the truth; it is his desire or aim not to know. The second carelessly fails to confirm the truth; perhaps he was in a hurry and did not want to take the time to find out. It was not his desire or aim to remain ignorant. Though both ultimately may cause the same damage, and though both were aware of the same risk before they acted, the conduct of the first individual may be more reprehensible simply because of the increased level of deliberateness with which he acted. The more deliberately a person acts in what he recognizes to be a potentially criminal fashion, the worse we generally consider his conduct to be from a moral standpoint.²⁰¹

200. See *supra* subpart III(A).

201. As for social dangerousness, it is not clear whether one who purposefully avoids positive knowledge would be any more or less dangerous than one who carelessly or otherwise (other than purposefully) avoids positive knowledge. There is no way to tell whether such an individual would be more or less likely to repeat such behavior on a future occasion, or to cause a bad result to occur with any greater frequency. If we were to generalize, however, we might assume that it is more likely that one who has it as his aim or desire to avoid positive knowledge of suspicious criminal circumstances would engage in illegal activity on future occasions than one who carelessly avoided positive knowledge of such circumstances. Presumably, the latter individual, if he is more attentive on a future occasion, might be less likely to repeat his criminal behavior than the former individual.

Wilfulness-based definitions of wilful ignorance therefore describe a state of mind that is somewhat more culpable than recklessness. It is still not clear, however, that the culpability of even this type of wilful ignorance rises to the same level as that of knowledge.²⁰² Is one who purposefully avoids finding out the truth always as bad as one who actually knows the truth?

IV. Historical Indicators of Added Culpability

A survey of the historical development of the doctrine of wilful ignorance in criminal law reveals that even this purposefulness factor is probably not enough, by itself, to warrant treating wilful ignorance as knowledge in all situations. As the doctrine evolved, it was not used to satisfy a required mens rea of knowledge in every instance. One or another additional factor, aside from the deliberateness of the individual's ignorance, was almost always present. These additional factors contributed to the culpability of the behavior or state of mind involved in the particular situations in which the doctrine was used. This Part investigates the nature of these added inculpatory factors to determine whether any are sufficient to raise the culpability level of wilful ignorance to that of knowledge.

Throughout its development, the doctrine of wilful ignorance was not always considered adequate to satisfy a required mens rea of knowledge. In most early English and American criminal cases, wilful ignorance was employed as a knowledge substitute only for regulatory²⁰³ and other

202. At least one writer implies that one who acts with a conscious, deliberate avoidance of the truth is as culpable as one who acts knowing or confirming the truth. See Perkins, *supra* note 1, at 965. Rollin Perkins argues that a defendant who drives a car containing contraband into the country, and who acts with a conscious purpose to avoid learning the truth of the contents of the vehicle, is culpable because "[h]e would not have acted with a conscious purpose to avoid learning the truth about the contents of the vehicle unless he was afraid he would discover that driving the vehicle across the border would violate the law." *Id.* at 964 n.52. Perkins concludes that "[n]o honest person avoids an investigation because of such a fear." *Id.*

203. For English regulatory cases, see, for example, the licensee cases (suffering gambling on premises licensed to sell liquor), such as *Lee v. Taylor*, 107 L.T.R. 682 (K.B. 1912); *Somerset v. Hart*, 12 Q.B.D. 360 (1884); *Redgate v. Haynes*, 1 Q.B.D. 89 (1876); *Bosley v. Davies*, 1 Q.B.D. 84 (1875); cases involving the sale of liquor to minors in violation of the Intoxicating Liquors (Sale to Children) Act, 1901, 1 Edw. 7, ch. 27 (Eng.), such as *Emary v. Nolloth*, 2 K.B. 264 (1903); *Conlon v. Muldowney*, 2 Ir. R. 498 (K.B. 1904); and cases involving violations of the Road Traffic Act, 1930, 20 & 21 Geo. 5, ch. 43, §§ 61, 72 (Eng.), and the Road Traffic Act, 1934, 24 & 25 Geo. 5, ch. 50, § 25 (Eng.), prohibiting anyone from permitting a certain class of vehicles to be used as an express carriage without the proper license, including *Evans v. Dell*, 1 All E.R. 349 (K.B.D. 1937).

For American regulatory cases, see, for example, cases involving violation of the Revenue Statutes for certifying checks with insufficient funds, such as *Spurr v. United States*, 174 U.S. 728 (1899) and *Chadwick v. United States*, 141 F. 225 (6th Cir. 1905); and the railroad fee cases, such as *United States v. General Motors Corp.*, 226 F.2d 745 (3d Cir. 1955), and *United States v. Erie R.R.*, 222 F. 444 (D.N.J. 1915).

relatively nonserious²⁰⁴ offenses.²⁰⁵ Moreover, in almost every instance in which it served to fulfill a knowledge requirement, special indicia of culpability were present. One of these, discussed above, was the fact that the description of wilful ignorance stressed that the guilty individual purposefully, intentionally, deliberately, or wilfully have avoided positive knowledge. Courts focused not on how strongly the individual suspected a particular fact nor on how obvious the fact may have been, but rather on the deliberateness of the defendant's effort to abstain from learning or confirming the truth. Although this factor attaches a significant measure of added culpability, it was rarely the only such factor. Purposeful avoidance was almost always accompanied by some additional factor that contributed to the culpability of the behavior involved.

One such added factor appears in the "connivance" cases, described earlier. In its most probable legal meaning, connivance includes the notion that the individual deliberately tries to remain ignorant for the specific purpose of permitting or facilitating an illegal act committed by someone else.²⁰⁶ This factor—a motive to further or permit someone else's illegal act—adds to the moral blameworthiness and the culpability of the wilfully ignorant individual. A different class of cases, which I will call the "duty-to-know cases," involves an additional inculpatory factor. In these situations, an express or implied duty exists to ascertain the truth of some fact (hence, duty to know), and the guilty individual purposefully abstains from ascertaining the truth despite his duty. A third additional inculpatory factor surfaces in the definition of wilful ignorance appearing in a growing number of more recent cases. In these cases, courts append to their description of wilful ignorance the notion that the individual's specific, conscious purpose in deliberately remaining ignorant is to avoid the criminal consequences of acting with positive knowledge. Each of these factors raises the culpability of the wilfully ignorant behavior involved.

204. Examples of nonserious offenses in England to which the doctrine was applied include cruelty to a bullock, *see Elliott v. Osborn*, 65 L.T.R. 378, 379 (Q.B. 1891), and unauthorized possession of government property, *see Regina v. Sleep*, 169 Rev. Rep. 1296, 1301-02 (Q.B. 1861) (Crompton, J.). In America, examples include concealing personal property from a trustee in bankruptcy, *see United States v. Yasser*, 114 F.2d 558, 560 (3d Cir. 1940); *Rachmil v. United States*, 43 F.2d 878, 881 (9th Cir. 1930), *cert. denied*, 283 U.S. 819 (1931); encouraging the importation of contract laborers, *see Grant Bros. Constr. Co. v. United States*, 114 P. 955, 957 (Ariz. 1911), *aff'd*, 232 U.S. 647 (1914); and failing to restrain a house of prostitution, *see People v. Glennon*, 67 N.E. 125, 128-29 (N.Y. 1903).

205. The early use of wilful ignorance only in regulatory and relatively nonserious cases could indicate either that there is something distinctive about these offenses that particularly warrants application of the wilful ignorance doctrine or, more likely, that a somewhat questionable mens rea (that is, one that is questionsbly like the required state of knowledge) justifies criminal liability only when less is at stake in the way of punishment.

206. *See supra* notes 48-58 and accompanying text.

A. *Connivance Cases*

Subpart II(A) discussed a group of cases referred to as the “connivance” cases. Where wilful ignorance is described as connivance, it means either (1) pretended ignorance or (2) suspicion of a fact coupled with the deliberate avoidance of positive knowledge for the specific purpose of fostering or permitting illegal activity by another.²⁰⁷ We need not concern ourselves with the first possible meaning for purposes of this discussion. Where wilful ignorance is only pretended ignorance, it is a state in which knowledge actually exists.²⁰⁸ Thus, such a wilfully ignorant party is at least as culpable as a knowing party because he *is* a knowing party.²⁰⁹

However, the second meaning of connivance illustrates the principle that early wilful ignorance cases usually included at least two special inculpatory factors. First, this definition of wilful ignorance contains the requirement of purposeful avoidance of knowledge. As explained in the previous section, the purposefulness or deliberateness of the avoidance adds a culpable dimension to the defendant’s ignorance. Second, the definition contains an additional inculpatory factor. The conniver has a specific, conscious purpose covertly to permit or to promote someone else’s illegal conduct. He acts, in essence, like a secret or passive co-conspirator.²¹⁰

This second factor transforms the wilfully ignorant individual into a more culpable actor. To illustrate, consider two innkeepers who operate hotels in which gambling occurs in the patrons’ rooms after the owner has left for the day. Both proprietors suspect that gambling might occur but both deliberately avoid confirming, so that neither knows gambling is actually taking place. Innkeeper *A* avoids confirming because he has it as his specific aim or purpose to foster the illegal conduct. He knows that allowing gambling after hours will bring him more business, so he avoids finding out whether or not it is actually taking place specifically to enable it to take place. Innkeeper *B*, on the other hand, deliberately avoids confirming because he does not want to stay late at work or to pay an

207. See *supra* notes 36-54 and accompanying text.

208. See *supra* notes 36-52 and accompanying text.

209. In fact, it could be argued that wilful ignorance as feigned ignorance is even more culpable than knowledge. One who feigns is acting in a covert, secretive manner. The additional factor of attempted concealment could present a potentially more dangerous situation from an enforcement point of view, as it makes it more difficult to ferret out criminal activity.

210. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 278 (1984) (defining “connive,” in part, as “to cooperate secretly” or to “conspire”). The conniver may not, however, meet the legal definition of a conspirator. For example, an agreement to commit an illegal act “is the ‘essence’ or ‘gist’ of the crime of conspiracy.” LAFAVE & SCOTT, *supra* note 32, § 6.4(d), at 531. The conniver may not actually have agreed to permit or promote the illegal activity, yet he may nevertheless secretly indulge it.

employee overtime to monitor the premises. He has no particular desire or aim to allow gambling to occur.

Although their actions produce the same evil,²¹¹ *A* is more morally blameworthy. Like *B*, he is willing to take the risk that illegal activity, albeit someone else's, might occur. Unlike *B*, however, *A* actually wants to allow the illegality to prosper. He not only willingly risks tolerating illegal action, he even desires to permit or foster it. His motives are more malicious, and he is more consciously and deliberately criminal. Hence, the added factor appearing in connivance cases—a purpose to indulge illegal activity—contributes to an increased level of criminal culpability for the wilful ignorance involved. Whether this higher level of culpability matches that of knowledge is not clear.²¹² For reasons discussed earlier,²¹³ the required mens rea for many connivance offenses was most likely something less than knowledge, such as “suffering,” so it was not necessary that the culpability level of this activity match that of knowledge.

B. *Duty-to-Know Cases*

Another pattern emerging from an examination of early wilful ignorance cases, particularly those in the United States, is that the doctrine usually arose in situations in which an individual had a legal or moral duty to know a fact he was asserting to be true,²¹⁴ or at least to make

211. *A*'s and *B*'s “actions” referred to here are their omissions to find out whether a crime is taking place. The “evil” produced by these actions is not the gambling itself, for failing to acquire knowledge of the illegal activity may not have produced or caused the activity. Rather, the evil produced by their actions or omissions is the tolerance of illegal activity—the very evil at which the statute outlawing “suffering” of gambling is aimed. Presumably, tolerance of illegal activity is outlawed because it makes the illegal activity itself more likely to occur.

212. *But see* Edwards, *supra* note 1, at 302 (“[N]o real doubt has been cast on the proposition that connivance is as culpable as actual knowledge.”).

213. *See supra* subpart II(A); *supra* note 59 and accompanying text.

214. This pattern continues in recent case law. Many modern wilful ignorance instructions and issues still arise in cases involving an express or implied duty to know. *See, e.g.,* United States v. Ramsey, 785 F.2d 184 (7th Cir.) (upholding convictions for false representations in a fraudulent loan brokering scheme), *cert. denied*, 476 U.S. 1186 (1986); United States v. Precision Medical Lab., Inc., 593 F.2d 434 (2d Cir. 1978) (affirming a conviction for Medicaid and Medicare fraud based on false statements made on claim forms); United States v. Hanlon, 548 F.2d 1096 (2d Cir. 1977) (upholding a conviction for fraud based on false statements made in bank loan documents); United States v. Wright, 537 F.2d 1144 (1st Cir.) (upholding a conviction for false statements in connection with the purchase of a firearm), *cert. denied*, 429 U.S. 924 (1976); United States v. Gentile, 530 F.2d 461 (2d Cir.) (affirming a conviction for false representations in connection with securities fraud), *cert. denied*, 426 U.S. 936 (1976); United States v. Natelli, 527 F.2d 311 (2d Cir. 1975) (same), *cert. denied*, 425 U.S. 934 (1976); United States v. Thomas, 484 F.2d 909 (6th Cir.) (upholding a conviction for a false statement in connection with the purchase of a firearm), *cert. denied*, 414 U.S. 912 (1973) and 415 U.S. 924 (1974); United States v. Grizaffi, 471 F.2d 69 (7th Cir. 1972) (affirming a conviction for false statements made to the federal government in connection with real estate development fraud), *cert. denied*, 411 U.S. 964 (1973); United States v. Sarantos, 455 F.2d 877 (2d Cir. 1972) (upholding convictions for conspiracy to make false statements to the Immigration and Naturalization Service

reasonable inquiry to ascertain the truth of the matter asserted.²¹⁵ This pattern is significant because the act or state of deliberately avoiding knowledge is more culpable when one has a special duty to know or to inquire than when no such exceptional obligation exists.

One of the best illustrations of the legal duty-to-know principle is found in *Spurr v. United States*,²¹⁶ the first Supreme Court case to mention wilful ignorance.²¹⁷ *Spurr* involved a bank officer charged with wilfully certifying a check when there were insufficient funds in the drawer's account.²¹⁸ Two references in the decision were made to wilful ignorance. The Court ruled that the applicable criminal statute²¹⁹ required certification with the "wrongful intent" that the drawer obtain money that he did not have.²²⁰ It then explained that such "evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact."²²¹ Later, in deciding whether supplemental instructions confused the jury's understanding of the wrongful intent requirement, the Court quoted at length portions of the original charge relating to mens rea. Among these passages was the trial court's instruction that the defendant should be acquitted if the jurors were not satisfied that he actually knew of the insufficiency, "unless you are convinced . . . that he wilfully, designedly and in bad faith . . . shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."²²²

regarding marriages); *United States v. Egenberg*, 441 F.2d 441 (2d Cir.) (upholding a conviction for false statements on income tax returns), *cert. denied*, 404 U.S. 994 (1971); *United States v. Sheiner*, 410 F.2d 337 (2d Cir.) (upholding convictions for false representations regarding the genuine nature of "multi-struck" (collectible) coins), *cert. denied*, 396 U.S. 825 (1969); *United States v. Benjamin*, 328 F.2d 854 (2d Cir.) (affirming convictions for securities fraud in which an attorney and an accountant made false representations), *cert. denied*, 377 U.S. 953 (1964).

215. One writer notes that, in wilful ignorance cases, "courts have in effect imposed a duty to search for additional facts upon actors who have been exposed to certain second-order evidence." Delgado, *supra* note 197, at 480.

216. 174 U.S. 728 (1899).

217. The references to wilful ignorance in *Spurr* are dicta, because the propriety of the trial court's wilful ignorance charge was neither questioned nor raised on appeal. *See id.* at 735.

218. *Id.* at 729-30.

219. Act of March 3, 1869, ch. 135, 15 Stat. 335 (codified as amended at 12 U.S.C. § 501 (1988)) made it unlawful for a bank officer to certify a check unless the person or company drawing the check had sufficient funds on account to cover the check. A subsequent statute made a wilful violation of the previous statute a criminal misdemeanor. *See* Act of July 12, 1882, ch. 290, § 13, 22 Stat. 162 (codified as amended at 18 U.S.C. § 1004 (1988)).

220. *Spurr*, 174 U.S. at 735.

221. *Id.*

222. *Id.* at 738-39. Both of these references to wilful ignorance have been somewhat misused as authority. Although they have been cited as indicating Supreme Court approval of wilful ignorance as an alternative to actual knowledge, *see* Robbins, *supra* note 1, at 197-98 ("The United States Supreme Court signaled its approval of deliberate ignorance as an alternative to actual knowledge in 1899, in

These references to wilful ignorance appear to be an indication that, in a case such as *Spurr*, when one has a specific statutory duty to investigate and to obtain knowledge of a fact in order lawfully to perform some act, one cannot deliberately fail to investigate, remain ignorant, and thereby escape liability for the act. Indeed, a bank officer certifying a customer's check had a duty not only to know what he might have observed in passing had he not turned away, but affirmatively to investigate the state of the account upon which he certified funds. Thus, even if the defendant in this circumstance was truly ignorant of the insufficiency of the funds, his affirmative duty to inquire or to know before certifying the check rendered his wilful ignorance exceptionally culpable.²²³ Whether or not this level of culpability matches that of actual knowledge, it is sufficient and appropriate for finding criminal liability in a case in which one has a special statutory or other formal legal duty to know.²²⁴

Spurr v. United States."); Comment, *supra* note 10, at 471 n.36 ("[F]avorable mention was made of the concept in dictum."), they should not be so read. In the first passage, the Court is not discussing knowledge, but rather "intent," in the sense of purpose or aim. See *supra* note 100. Thus, the first passage states that "wrongful intent," or "evil design" or purpose, to certify unlawfully—and not knowledge of insufficient funds—may be found if the defendant deliberately remains ignorant of the sufficiency of the funds drawn upon. Moreover, according to the remainder of this passage, "evil design" may also be found if the defendant is grossly indifferent to his duty to determine the sufficiency of the funds. Therefore, if this passage is understood to equate knowledge with wilful ignorance, it must also be understood to equate gross negligence or recklessness (gross indifference to one's duty) with knowledge. Neither is an appropriate understanding.

As for the latter passage, the Court was simply quoting portions of the jury instructions given by the trial court in order to show that the required mens rea—wilfulness—had been charged. The Court never indicated whether the language referring to wilful ignorance was correct or appropriate and, in fact, never specifically focused on or discussed this reference. *But see* *United States v. Erie R.R.*, 222 F. 444, 450 (D.N.J. 1915) ("It thus appears that the Supreme Court [in *Spurr*] has given its sanction to the proposition that one may be held criminally responsible for purposely keeping himself in ignorance of facts, when the crime with which he is charged required *knowledge* of those facts." (emphasis in original)).

223. Actually, one could view this situation two ways, as an example of either a more culpable actor or a less culpable crime. The actor could be considered more culpable than the usual wilfully ignorant actor, because he was wilfully ignorant in circumstances in which he had a duty to know what he avoided knowing. On the other hand, the crime could be viewed as requiring less in the way of culpability than knowledge, because the actor may be guilty not only for knowingly certifying a bad check but also for failing to acquire the knowledge that it was a bad check. However, it is circular (and therefore not useful) to view the case in the second way. Ultimately, all wilful ignorance cases are situations in which the crime involved is less culpable than one requiring true knowledge, precisely because wilful ignorance is found to satisfy the mens rea for the crime and wilful ignorance is less culpable than knowledge. The duty-to-know cases cited and discussed in this section are a perfect example, because in these cases courts profess to be holding the defendants to a knowledge standard, yet allow wilful ignorance to suffice for conviction.

224. This is a far more restrictive ruling than that wilful ignorance is generally an adequate substitute for knowledge whenever knowledge is required. Nevertheless, *Spurr* has been interpreted as authority that the Supreme Court sanctioned criminal responsibility for one who "purposely keep[s] himself in ignorance of facts, when the crime with which he is charged required *knowledge* of those facts." *Erie*, 222 F. at 450 (emphasis in original).

Several other early American criminal cases citing the doctrine of wilful ignorance also involved an express or implied affirmative statutory duty to acquire knowledge of the fact in issue.²²⁵ A similar pattern arose in cases in which there was no statutory or other formal legal duty to acquire knowledge of some fact, yet in which a comparable unique moral duty to know existed, owing to the nature of the crime involved.²²⁶ Many early American cases concerning offenses such as false swearing, false pretenses, and false representation²²⁷ indicate that making a false statement either by wilfully shutting one's eyes to circumstances indicating it is false, or without information justifying a belief in its truth (termed "recklessness"²²⁸), could be as culpable a mental state as the otherwise

225. *See, e.g., id.* (noting that in prosecution for granting an unlawful concession in freight rates, the statutory duty to ascertain and apply the lawful rate implies congressional intent not to exempt those who remain wilfully ignorant of the correct rate); *Standard Oil Co. v. United States*, 164 F. 376, 381-84 (7th Cir. 1908) (holding that the Elkins Act implies a statutory duty on a carrier but not on a shipper to ascertain and apply the correct shipping rates), *cert. denied*, 212 U.S. 579 (1909). More recent cases in which courts have found an express or implied statutory duty to acquire knowledge of a material fact include *United States v. Natelli*, 527 F.2d 311, 322-23 (2d Cir. 1975) (involving an implied statutory duty under federal securities laws), *cert. denied*, 425 U.S. 934 (1976); *United States v. Squires*, 440 F.2d 859, 863 (2d Cir. 1971) (same); *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir.) (same), *cert. denied*, 377 U.S. 953 (1964).

226. *See, e.g., United States v. Bernstein*, 533 F.2d 775, 796 (2d Cir.) (stating that because a mortgagee knows that the Federal Housing Administration is relying on the form it submits, its "declaration [in its certificate] that the information was 'true and complete to the best of its knowledge and belief' carries [the same] obligation at least" as under the federal Securities Act, that is, "an affirmative duty to investigate" the truth of matters asserted (quoting *Squires*, 440 F.2d at 863-64)), *cert. denied*, 429 U.S. 998 (1976); *see also United States v. Frank*, 494 F.2d 145, 152-53 (2d Cir.) (indicating that in the prosecution of attorneys representing the parties in a complicated fraud, "lawyers cannot 'escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen'" (quoting *Benjamin*, 328 F.2d at 863)), *cert. denied*, 419 U.S. 828 (1974); *United States v. Hoffman*, 13 F.2d 269, 277 (N.D. Ill. 1925) (holding that a sheriff had a duty to know about corruption and bribery in his jail and that the duty created a presumption of knowledge of the wrongdoing), *aff'd*, 13 F.2d 278 (7th Cir.), *cert. dismissed per stipulation*, 296 U.S. 666 (1926).

227. *See, e.g., People v. Cummings*, 55 P. 898, 899 (Cal. 1899) (affirming a conviction for procuring a promissory note by false and fraudulent representations when those representations were made "without information justifying a belief that they were true"); *State v. Lintner*, 41 P.2d 1036, 1038-39 (Kan. 1935) (holding a false representation by a bank employee of the value of bank stock to be sufficient to charge the employee with knowledge); *State v. Rupp*, 151 P. 1111, 1112 (Kan. 1915) (stating that a conviction for the making of a false affidavit may be affirmed if the defendant swore to a fact of which he was ignorant); *Rand v. Commonwealth*, 195 S.W. 802, 808 (Ky. Ct. App. 1917) (stating that "making a statement recklessly and without information justifying a belief in its truth is equivalent to the making of a statement knowing it to be false" with respect to obtaining money by false pretenses); *People v. Burgess*, 155 N.E. 745, 746 (N.Y. 1927) (affirming a conviction for obtaining money by false representations "which [the defendant] would have known were false if he had chosen to use sources of information which were easily available," when the defendant sold stock by making false allegations as to the financial condition of a business); *State v. Pickus*, 257 N.W. 284 (S.D. 1934) (reversing a conviction for false pretenses related to the submission of inflated construction bills).

For more recent examples of wilful ignorance cases involving fraud and false statement, see *supra* note 214. Wilful ignorance is also often employed in civil cases involving fraud. *See, e.g., FDIC v. Antonio*, 843 F.2d 1311, 1314 (10th Cir. 1988).

228. *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.) (stating that criminal recklessness,

required knowledge of falsity.²²⁹ These fraud-related crimes were similar in an important respect to the crimes in *Spurr* and the other statutory duty-to-know or duty-to-inquire cases. In all these cases, the activity that gave rise to criminal liability was the defendant affirmatively asserting the truth of a fact so that others would rely on his assertion. Although there may be no legal duty in the false statement situation to make sure that one knows that one's assertion is a fact, there is certainly a socially implied moral obligation to know that what one affirmatively asserts to be true is indeed true.²³⁰

This duty-to-know pattern seems to permeate our earliest criminal applications of wilful ignorance,²³¹ particularly when actual knowledge is otherwise the required mental state. The notion that one cannot be wilfully ignorant when one has a duty to know is quite logical and probably stems from antecedent criminal law principles relating to mens rea and mistake of fact. The general rule was that ignorance or mistake of fact would excuse a criminal act.²³² The rationale for this principle is that one who acts from an honestly mistaken belief does not possess the

"the legal equivalent of knowledge," occurs when a defendant makes an assertion, knowing it will likely mislead and cause damage, without checking on facts easily within reach), *cert. denied*, 476 U.S. 1186 (1986).

229. It is not clear that knowledge is always the required mens rea for these offenses. While some courts state that knowledge is required, *see, e.g., Pickus*, 257 N.W. at 289; *Rand*, 195 S.W. at 805, 808, other courts only imply that knowledge is required, *see, e.g., Cummings*, 55 P. at 899. In yet other cases, it is never clearly stated whether the court is requiring a mens rea of knowledge, recklessness, or even negligence. *See, e.g., Rupp*, 151 P. at 1111; *Lintner*, 41 P.2d at 1038.

230. *See Rupp*, 151 P. at 1112 (stating that "good faith" requires an affiant to have an affirmative belief in the truth of the statement based on a fair and honest weighing of the information at hand).

231. A few early American criminal cases using wilful ignorance language do not involve a duty-to-know situation, but are otherwise inapposite. For example, in *State v. Drew*, 124 N.W. 1091 (Minn. 1910), the statutory mens rea was an objective negligence standard ("knows or has good reason to know," *id.* at 1092), so there was no question that wilful ignorance, a higher, subjective standard under virtually every early formulation, could suffice. Also, *People v. Sugarman*, 215 N.Y.S. 56 (N.Y. App. Div.), *aff'd*, 154 N.E. 637 (N.Y. 1926), involved the prosecution of a securities broker for "assenting" to the sale of securities by a member of the broker's firm without the consent of the securities owner. The court held that the defendant's personal knowledge of the particular transaction in issue was not necessary for conviction; his knowledge of, participation in, and assent to certain routine, irregular business practices of the firm, pursuant to which unauthorized sales were routinely made, was sufficient to find that the defendant "assented" to this particular sale. The court noted that once the broker knew of such practices, he could not "escape responsibility for the consequences [of these irregularities in subsequent transactions] by closing his eyes as to the subsequent method of conducting business." *Id.* at 62-63. This case does not quite find that wilful ignorance may supplant a knowledge requirement. It is more of a finding that once one knows of, and assents to, a continuing unlawful practice, one cannot shut one's eyes to what one already knows.

Although the earliest English uses of wilful ignorance were not in false-statement or similar duty-to-know cases, Edwards, writing in 1954, noted that the English had extended the doctrine into the field of fraud offenses. *See Edwards, supra* note 1, at 303 n.56.

232. *See* 1 JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 301, at 179 & n.2 (7th ed. 1882) ("Ignorance or mistake in point of fact is, in all cases of supposed offence, a sufficient excuse." (quoting *Myers v. State*, 1 Conn. 502, 505 (1816) (Gould, J.))).

required "evil intent,"²³³ and is therefore not deserving of punishment.²³⁴ However, mistake of fact would not absolve one from criminal liability if, given the circumstances, it did not negate the actor's evil intent or guilty mind.²³⁵ Consequently, if an actor had a duty to know before acting and wilfully refused or even recklessly or negligently failed to find out, he not only breached his duty, but he could also be considered personally responsible for his mistaken belief, and thus morally blameworthy.²³⁶

The duty to know puts the onus on the actor to find out the truth of the matter before he takes it upon himself to profess its truth or otherwise to act upon its truth.²³⁷ In a false statement case, for example, the duty to ascertain the truth of the matter one is asserting creates an obligation not to make a statement about the matter without first actually determining whether or not it is true.²³⁸ Thus, in such a situation, if someone wilfully avoids confirming that the matter he is asserting is true, he could be considered as personally responsible—and as morally blameworthy²³⁹—for the results of his action as someone who actually knew his

233. *Id.* § 303, at 181.

234. In explaining why a mistake of fact would excuse one from punishment, Joel Bishop eloquently asserts:

To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because, misled while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing a wrong in the future; it would inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts, and promote vice instead of virtue.

Id. § 301, at 179.

235. *Id.* § 302, at 179-80.

236. *Id.* § 302, at 180.

237. *Cf.* *United States v. Squires*, 440 F.2d 859, 863 (2d Cir. 1971) (indicating that in "areas of fiduciary responsibility," such as the securities laws, "persons issuing statements are under an affirmative duty to investigate, and [therefore] it is entirely appropriate to include 'should have known' within the definition of 'know'").

238. *Cf.* *United States v. Ramsey*, 785 F.2d 184, 190 (7th Cir.) (noting that, in a prosecution for wire and mail fraud based on false representations, the central point of the wilful ignorance concept is "that a person who has enough knowledge to prompt an investigation and then avoids further knowledge really does 'know' all that the law requires," for, under a proper description of wilful ignorance, "it takes a fairly large amount of knowledge to prompt further investigation"), *cert. denied*, 476 U.S. 1186 (1986).

239. *See generally PERKINS & BOYCE, supra* note 1, at 861-75 (discussing the evolution of *scienter* and the knowledge requirement in criminal law). Perkins and Boyce observe that a statement made with reckless disregard for the truth may be as onerous as a wilfully false statement.

Ethically there appears to be little difference when a man makes a false representation for the purpose of inducing another to act for his benefit between the quality of conduct of the man who knows or believes his representation is false and that of the man who has neither knowledge nor belief concerning it, but nevertheless makes the representation, neither knowing nor caring whether it be true or false.

Id. at 869 (quoting *State v. Pickus*, 257 N.W. 284, 294 (S.D. 1934)).

Although the moral blameworthiness of the wilfully ignorant individual in this situation may be comparable to that of the knowing individual, it is not as clear that one who makes a false statement

statement was false.²⁴⁰

In order to demonstrate that there is something particularly onerous about being wilfully ignorant in a duty-to-know case, it is useful to distinguish between one who acts out of wilful ignorance in a duty-to-know situation and one who acts out of wilful ignorance in any other situation. *Regina v. Sleep*,²⁴¹ perhaps the first criminal case involving wilful ignorance, provides a useful example. Mr. Sleep, an ironmonger, was charged with the unauthorized possession of government property. He had delivered a cask for shipment that contained copper bolts, some of which were marked with the British government's special broad arrow sign, designating that they were government property.²⁴² Knowledge that the bolts were marked with the specified government markings was required for conviction,²⁴³ and there was some question as to whether Sleep had noticed or wilfully ignored the broad arrow marks.²⁴⁴ In this case, the ironmonger had no special affirmative duty to find out whether every bolt he bought or sold was government property; he had only a general duty to act lawfully.²⁴⁵

On the other hand, suppose the problem of theft from government stores reached such proportions that a statute was enacted requiring ironmongers to inspect bolts for government markings before any were bought or sold, and to certify upon sale that such goods were not government property. If Sleep suspected a shipment of bolts he was selling was marked and he decided not to find out, it is much easier to conclude he should be guilty of selling government property after passage of the statute. It is blameworthy to be suspicious and to deliberately not check, but it is surely worse to do so when a statute requires a check before acting, and worse still to assert that one has checked and that everything is in order when in fact one deliberately does not check. Each instance

through wilful ignorance would pose the same danger to an unsuspecting public as one who makes a false statement knowing he is lying. Some people will be willing to assert the truth of a matter they strongly suspect is not so but are not certain is false, yet would be unwilling to make the same statement if they felt certain it were false.

240. Likewise, someone who is not wilfully ignorant, but who knows that he has no idea whether his statement is true, should also be guilty if he makes a false statement. Some courts consider such an actor to be criminally liable for his statement. *See, e.g., State v. Rupp*, 151 P. 1111, 1112 (Kan. 1915) (holding that a defendant may be liable for swearing falsely in an affidavit if he "swear[s] to a fact, of the existence of which he knows himself to be entirely ignorant").

241. 169 Eng. Rep. 1296 (Q.B. 1861).

242. *Id.* at 1296-97.

243. *Id.* at 1299-1300.

244. *Id.* at 1300-02.

245. *Cf. Evans v. Dell*, 1 All E.R. 349, 353 (K.B.D. 1937) (Hewart, L.C.J.) (rejecting the argument that the proprietor of a leased vehicle has the duty to inquire into facts which would have indicated that the vehicle was being used as a "stage carrier," a use for which the proprietor did not have a license). The implication of *Evans* is that there is no general duty to be sure one is not acting illegally.

presents a progressively more conscious or calculated act of wrongdoing, and the additional deliberateness renders the conduct more morally culpable.

The distinctive moral blameworthiness associated with the breach of a duty to know might explain why wilful ignorance most often appeared as an adequate mens rea in early criminal cases when such a duty existed, either legally or ethically. It might also account for the continuing sizable number of fraud-related wilful ignorance cases.²⁴⁶ In any event, duty-to-know cases incorporate an added culpability factor that stems, not from any particular language or notions used to define wilful ignorance, but from this special situational use of the doctrine. One who deliberately avoids knowing what he has a positive duty to know—either because a statute requires him to know or because he affirmatively asserts that he knows so that others will rely on his assertion—is more malicious than one who deliberately avoids learning something that he has no special obligation to know.

C. *Obstructionist-Purpose Cases*

As use of the doctrine of wilful ignorance began to expand beyond connivance, duty-to-know, and regulatory and other nonserious cases, a new factor surfaced in the definition of wilful ignorance. A growing number of modern cases supplement the first purposefulness factor—deliberate, purposeful avoidance of knowledge—with an additional purposefulness factor—a purpose to avoid criminal responsibility and criminal sanction.²⁴⁷ As wilful ignorance is described in these cases, a

246. See *supra* note 214.

247. See, e.g., *United States v. Fingado*, 934 F.2d 1163, 1167 (10th Cir. 1991) (noting that the facts of the case support a possible inference that the defendant “selectively educated himself” to create a defense if he was caught), *cert. denied*, 112 S. Ct. 320 (1991); *United States v. Mang Sun Wong*, 884 F.2d 1537, 1543 (2d Cir. 1989) (maintaining that a defendant who stayed in the car instead of being present at a drug sale could satisfy the requirement of knowledge if his acts indicated that “he was purposely avoiding knowledge of the truth” in order to have a defense if he was later arrested), *cert. denied*, 493 U.S. 1082 (1990); *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir.) (holding that a wilful ignorance charge should only be given when the evidence supports an inference that the defendant purposely contrived to avoid learning all the facts “in order to have a defense in the event of a subsequent prosecution”), *cert. denied*, 487 U.S. 1222 (1988); *United States v. Matias*, 836 F.2d 744, 749 (2d Cir. 1988) (describing the wilful ignorance charge as requiring a finding that the defendant consciously avoided confirming the presence of narcotics “to create a defense of lack of knowledge”); *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.) (noting that if a person with a lurking suspicion avoids further knowledge, this may support the inference “that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge”), *cert. denied*, 476 U.S. 1186 (1986); *United States v. Kallash*, 785 F.2d 26, 28 n.2 (2d Cir. 1986) (upholding a jury charge that one may not remain wilfully ignorant of a material fact “in order to escape the consequences of the criminal law,” and that it could treat the defendant’s deliberate avoidance of knowledge as knowledge if it found that he consciously avoided confirming that a check was stolen “so that he could say, if he was apprehended, that he did not know”); *United States v.*

person is charged with knowledge if he deliberately avoids learning the truth because he wants to be able to assert his ignorance in the event he is caught,²⁴⁸ or because he expects that honestly asserting ignorance will enable him to escape the criminal consequences of actually knowing.²⁴⁹ In other words, the defendant's conscious, considered purpose in avoiding

Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098-99 (9th Cir. 1985) (stating that the government must prove that the defendant purposely contrived to avoid learning all the facts "in order to have a defense in the event of subsequent prosecution"); *United States v. Josefik*, 753 F.2d 585, 589 (7th Cir.) (stating that intentionally avoiding knowledge "implies something verging on knowledge combined with a desire to escape the consequences of knowledge"), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984) (ruling that a wilful ignorance charge should only be given if there is evidence that the defendant purposely contrived to avoid learning all the facts "in order to have a defense in the event he was arrested and charged"); *United States v. Garzon*, 688 F.2d 607, 609 (9th Cir. 1982) (indicating that there must be evidence that the defendant purposely contrived to avoid learning all the facts "in order to have a defense in the event of being arrested and charged" for failure to inquire to constitute wilful ignorance (citation omitted)); *United States v. Restrepo-Granda*, 575 F.2d 524, 528 n.2 (5th Cir.) (describing wilful ignorance as the defendant "choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught"), *cert. denied*, 439 U.S. 935 (1978); *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977) (noting that the purpose of the wilful ignorance instruction is to prevent an individual "from circumventing criminal sanctions merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct"), *cert. denied*, 434 U.S. 1015 (1978); *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324 n.1 (9th Cir. 1977) (holding that the jury could find knowledge if the only reason the defendant did not learn there was marijuana in the car he drove was because he deliberately chose not to learn "for the very purpose of being able to assert his ignorance if he was discovered with the controlled substance in his possession"); *United States v. Joyce*, 542 F.2d 158, 161 n.11 (2d Cir. 1976) (dealing with a jury charge that "one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law"), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Jewell*, 532 F.2d 697, 704 (9th Cir.) (en banc) (emphasizing that wilful ignorance differs from positive knowledge only in that it encompasses "a calculated effort to avoid the sanctions of the statute while violating its substance"), *cert. denied*, 426 U.S. 951 (1976); *United States v. Moser*, 509 F.2d 1089, 1092 (7th Cir. 1975) (noting that a defendant is chargeable with knowledge if he deliberately chose not to learn what a controlled substance was "so he could assert his ignorance if he was discovered with the substance in his possession"); *United States v. Olivares-Vega*, 495 F.2d 827, 830 (2d Cir.) (charging the jury that it could find knowledge if the defendant "deliberately chose not to learn [what a substance was] for the very purpose of being able to assert his ignorance if he was discovered with the substance in his possession"), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Joly*, 493 F.2d 672, 674 (2d Cir. 1974) (dealing with a jury instruction that wilful ignorance can be treated as knowledge if the defendant deliberately tried to avoid learning that there was cocaine in the package he was carrying "in order to be able to say, should he be apprehended, that he did not know"); *cf. Murrieta-Bejarano*, 552 F.2d at 1325 (Kennedy, J., dissenting) (pointing out the absence of proof that the defendant deliberately avoided knowledge "in order to concoct a defense to potential criminal charges," and arguing that a wilful ignorance charge is inappropriate absent evidence that the defendant purposely contrived to avoid learning all the facts "in order to have a defense in the event of being arrested and charged").

248. *See, e.g., Kallash*, 785 F.2d at 28 n.2; *Restrepo-Granda*, 575 F.2d at 528 & n.2; *Murrieta-Bejarano*, 552 F.2d at 1324 n.1; *Moser*, 509 F.2d at 1092; *Olivares-Vega*, 495 F.2d at 830; *Joly*, 493 F.2d at 674; *see also WILLIAMS, supra* note 1, § 57, at 159 (contending that the defendant is wilfully ignorant only when "[h]e suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge").

249. *See, e.g., Alvarado*, 838 F.2d at 314; *Matias*, 836 F.2d at 749; *Ramsey*, 785 F.2d at 189; *Kallash*, 785 F.2d at 28 n.2; *Pacific Hide & Fur*, 768 F.2d at 1098-99; *Josefik*, 753 F.2d at 589.

knowledge is to obstruct or frustrate the operation of the criminal justice system.²⁵⁰ He wants affirmatively to participate in or to promote nefarious activity and nevertheless to avoid the repercussions by making sure one element of the applicable crime is lacking.²⁵¹

This second purposeful element of wilful ignorance adds measurably to the culpability of the behavior involved. Like a purpose to avoid knowledge, an affirmative purpose to further criminal activity while immunizing oneself from consequent liability involves increased criminal deliberateness. Consider two individuals, such as receivers of stolen goods, who were aware that an aspect of their conduct was likely to be criminal and who nevertheless acted. One deliberately avoided confirming that the suspicious goods were stolen because he acquired them inexpensively, and he feared that if he did find out he would be answerable for receipt of stolen goods. Another individual deliberately avoided confirm-

250. Glanville Williams maintains that wilful ignorance "requires in effect a finding that the defendant intended to cheat the administration of justice" and that the doctrine ought not to be expanded beyond this situation for fear that it would become "indistinguishable from the civil doctrine of negligence in not obtaining knowledge." WILLIAMS, *supra* note 1, § 57, at 159 (citation omitted); see also *Jewell*, 532 F.2d at 700 n.7 (citing WILLIAMS, *supra* note 1, § 57, at 159, for this interpretation of wilful ignorance).

251. Cf. *Jewell*, 532 F.2d at 704 (emphasizing that wilful ignorance encompasses "a calculated effort to avoid the sanctions of the statute while violating its substance" (footnote omitted)).

Reckless conduct may also involve this particular purposeful element. An actor who is aware of a substantial probability that some aspect of his conduct is criminal and who consciously disregards that risk often may disregard the risk precisely because he wants to promote or engage in illegal conduct and at the same time avoid the criminal consequences. He may avoid finding out for certain whether the particular aspect of his conduct is criminal with the specific, conscious purpose to frustrate application of the criminal justice sanction by obviating the mental element of a crime. But not every reckless actor falls into this pattern. A merchant who recklessly receives stolen merchandise, for example, could avoid finding out for certain whether the goods are stolen because he is simply careless, or because his sole purpose or aim is to obtain cheap merchandise; he may have no deliberate goal to avoid "knowing" and thereby avoid criminal prosecution. Thus, recklessness may, but does not necessarily, include this additional element.

When knowledge is required for conviction, or for an increased level of sanction over that imposed for recklessness, we give the benefit of the doubt to the reckless actor. He could be as "bad" as the knowing actor in any given case, but we do not know for certain whether he is. Laws that limit liability to the knowing, or that impose lesser sanctions on the reckless, may, in part, do so in recognition of the fact that not all of the reckless are as morally depraved as the knowing, though many individual reckless actors may be. Hence, in an attempt not to swing the net too wide, we exclude all the reckless individuals in order to exclude the significant number of less culpable reckless.

However, when what is otherwise wilful ignorance includes this additional obstructionist element, swinging the "knowledge" net wide enough to catch the wilfully ignorant might be justified: this element raises the level of blameworthiness of the actor's conduct when that conduct is already more culpable than recklessness. See *supra* subparts III(B)-(D). If the definition of wilful ignorance includes this enhanced culpability factor, virtually all the wilfully ignorant may well be as bad as the knowing. See *infra* notes 252-54, 270-73, and accompanying text. Of course, any individual reckless actor also may have the same improper, obstructionist motive as a wilfully ignorant actor, but reckless actors generally do not necessarily share this evil motive. Thus, again, we exclude all the reckless in order to exclude the significant number of less culpable reckless.

ing that the suspicious goods were stolen because he received them inexpensively from a good friend, and he did not want to appear to question the legality of his friend's conduct. The first individual's purpose or aim was to avoid criminal liability. The second individual's purpose or aim was to avoid jeopardizing his friendship. The first individual acted in a more deliberately criminal fashion. Both may have been motivated by greed, in the sense that they both desired to have the goods at a low price, but the first was also motivated by an affirmative desire to subvert criminal justice, while the second was not. The first actor, unlike the second, had it as his positive purpose to trick the system, so to speak.

This additional purpose or motive indicates an additional degree of moral depravity.²⁵² It shows the first actor to be pernicious rather than uncaring, as the second actor would be. This proposition follows from the earlier proposition that a purposeful state of mind is generally more malicious than a knowing state of mind.²⁵³ Moreover, the particular purpose involved here is a desire or aim to undermine the very function of the criminal law. There is something especially odious, from a criminal justice standpoint, about an express goal of obstructing the criminal justice process.²⁵⁴ This added element, then, significantly increases the culpability of wilfully ignorant behavior, and may well raise it to something close to that of knowing behavior.

V. A Suggested Definition of Wilful Ignorance

Several factors have thus far been identified that contribute to the culpability of wilfully ignorant behavior. One is a purpose to avoid knowledge, as opposed to a reckless or accidental avoidance of knowledge. This factor is almost always present in judicial descriptions of wilful ignorance and should always be required, as a minimum, to constitute wilful ignorance. Purposeful avoidance is traditionally accompanied by some other factor that increases the culpability of the actor's state of mind. One such factor is acting in wilful ignorance when there is a legal or ethical duty to know. Other culpability-enhancing factors include a specific, conscious purpose to allow, promote, or facilitate someone else's

252. One court has described the required phenomenon as "a willful and *perverse* intention to remain ignorant" by failing to make further inquiry. *United States v. Erie R.R.*, 222 F. 444, 448 (D.N.J. 1915) (emphasis added) (quoting the trial court's jury instructions). Another, in a criminal forfeiture situation, has indicated that permitting individuals to "'corruptly' shut their eyes to facts easy of ascertainment . . . would encourage the unscrupulous." *United States v. Bailey*, 42 F.2d 908, 910 (D. Colo. 1930).

253. *See supra* notes 171-83 and accompanying text.

254. The intentional obstructor may not pose any greater danger to society than one who avoids positive knowledge for more acceptable reasons. The fact that he is affirmatively trying to subvert criminal justice does not mean that he will be any more successful in doing so, or that he will be any more likely to repeat such behavior in the future.

illegal conduct, and a specific conscious purpose to commit an act that one is aware is probably criminal while deliberately frustrating the operation of the criminal law. Each of these items augments the blameworthiness, if not the danger, of the behavior involved and thereby raises the culpability of the wilfully ignorant actor.

The paramount question remains: is wilful ignorance, if it encompasses any or all of these factors, as culpable as knowledge? With regard to wilful ignorance as connivance, we need not resolve this quandary, because the required minimum mens rea in connivance cases is usually a less culpable mental state than knowledge, such as "suffering."²⁵⁵ Similarly, in the special duty-to-know situations, wilful ignorance seems an appropriately guilty mens rea, whether or not it is as culpable as knowledge;²⁵⁶ therefore, for statutory duty-to-know and for fraud-related offenses, it would not be necessary to determine whether wilful ignorance merely approaches or actually attains a culpability level matching that of knowledge.²⁵⁷ But even in connivance and duty-to-know cases, some definition of wilful ignorance must apply, and it would seem wise to use a definition that is consistent with the definition of wilful ignorance used elsewhere in criminal law. Thus, it still remains to discover whether any formulation of wilful ignorance describes a mental state that is sufficiently culpable to be used as a wholesale knowledge equivalent.

Comparing the culpability of the various wilful ignorance enhancing factors explicated above to the culpability of knowledge seems suspiciously like comparing the proverbial apples and oranges. One way to circumvent this predicament is to focus instead on what the law intends to punish when it targets wilful ignorance. We punish the knowing actor because we want to condemn his willingness to act on his correct belief²⁵⁸ that what he is doing is wrong. He believes he is acting illegally and does it anyway. When we punish a wilfully ignorant actor, but not a reckless actor, in the same situation as the knowing actor, we are aiming for someone who is just as obdurate as the knowing actor. We want to catch the individual who may not know but is on the verge of knowing,²⁵⁹ and who displays

255. See *supra* subpart II(A).

256. See *supra* note 223 and accompanying text.

257. Although Part IV addressed the issue of the special propriety of wilful ignorance as a culpable mental state for certain false representation or fraud-related offenses, further study might be warranted if wilful ignorance is officially to be declared an adequate mens rea in duty-to-know cases. For example, Part VI examines the advisability of "lowering" the mens rea for drug importation so that it expressly includes some form of wilful ignorance, even one that may not match the culpability level of knowledge.

258. For a discussion of the punishment of one who believes he is committing a crime and would be doing so were the circumstances as he incorrectly believes them to be (the "impossibility" situation), see *supra* note 112.

259. Cf. *United States v. Josefik*, 753 F.2d 585, 589 (7th Cir.) (stating that avoiding knowledge

the kind of callousness that we find in a knowing actor. In essence, we want to punish those who (1) have very good information that some fact exists that makes what they are doing wrong;²⁶⁰ (2) *almost* believe that the fact exists;²⁶¹ and (3) intentionally avoid establishing whether the fact exists, (4) for some evil, dangerous, or otherwise highly improper reason—that is, for some purpose that evidences an especially high level of criminal callousness. The last historical culpability-enhancing factor noted in Part IV—a purpose to immunize oneself from criminal responsibility—is the only factor currently used that satisfies this fourth suggested requirement. Thus, a purpose to avoid criminal sanction by obviating an element of the crime (knowledge) should be included within any definition of wilful ignorance that is used to satisfy a required mens rea of knowledge.

The first two factors in this suggested formulation insure that the actor is truly on the verge of knowing. He must personally have good reason to know the fact in question, often expressed in Model Penal Code-type language as being “aware of a high probability”²⁶² of the fact, or in more traditional but less satisfactory terms, as closing one’s eyes “to what otherwise would have been obvious.”²⁶³ The actor must also almost

with intention implies “something verging on knowledge, combined with a desire to escape the consequences of knowledge”), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Joyce*, 542 F.2d 158, 161 (2d Cir. 1976) (“The very notion that one is straining to remain ignorant of obvious facts implies the imminence of actual knowledge.”), *cert. denied*, 429 U.S. 1100 (1977); WILLIAMS, *supra* note 11, at 125 (“The best view [of wilful ignorance] is that it applies only when a person is virtually certain that the fact exists.”); WILLIAMS, *supra* note 1, § 57, at 159 (“[A rule equating wilful ignorance with knowledge is] an unstable rule, because judges are apt to forget its limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew.”); *see also United States v. Jewell*, 532 F.2d 697, 704 (9th Cir.) (en banc) (citing WILLIAMS, *supra* note 1, § 57, at 159), *cert. denied*, 426 U.S. 951 (1976).

260. This factor is expressed in requirements that the wilfully ignorant individual closed his eyes “to what otherwise would have been obvious,” *see supra* note 94, or that he was “aware of a high probability” of the fact he was avoiding, MODEL PENAL CODE § 2.02(7). These obviousness and high probability requirements indicate that the actor must have good information on which to base his belief.

261. *Cf. Josefik*, 753 F.2d at 589 (holding that when a court finds it “inconceivable” that the defendant did not believe the merchandise he possessed was stolen, a wilful ignorance instruction is proper because it indicates “that he could not get off the hook simply by resolutely refusing to find out for sure whether it was stolen”).

262. MODEL PENAL CODE § 2.02(7). Rollin Perkins criticizes the Code’s requirement that culpability based on wilful ignorance be limited to instances in which the individual is aware of a high probability of unlawfulness. *See Perkins, supra* note 1, at 963-64. He observes that “where there is direct evidence of a deliberate plan to avoid knowing the truth, the degree of probability is unimportant.” *Id.* at 964. Perkins argues that the Code’s formulation is misguided because it confuses culpability with proof. He states that “[w]hen the need to investigate is recognized, culpability is established by a conscious effort to avoid learning the truth for fear of learning that contemplated action would be unlawful,” and that awareness of a high probability is only one means of establishing one’s appreciation of the need to investigate. *Id.* *But see Jewell*, 532 F.2d at 707 (Kennedy, J., dissenting) (“It is not culpable to form ‘a conscious purpose to avoid learning the truth’ unless one is aware of facts indicating a high probability of that truth.”).

263. *See supra* note 94. This particular formulation is less desirable than something like the

believe that the fact in question exists. If he fully believed, he would come within the definition of knowledge.²⁶⁴ Requiring him almost, yet not quite, to believe insures that he is about as close to knowing as one can be without actually knowing. Using the puzzle analogy described in Part III, when both these factors are present, the wilfully ignorant individual may be said to have ninety-five or ninety-six puzzle pieces that indicate awareness of the material fact—and therefore “culpability”—rather than the ninety or so he has under a Code-based definition of wilful ignorance.²⁶⁵

Even given these two factors, which frequently appear in some form in wilful ignorance cases,²⁶⁶ being on the verge of knowledge is not, by itself, enough. These factors do not make the actor as callous as a knowing individual, who is still farther along on the certitude spectrum. The third suggested factor, the one that most often and consistently appears in wilful ignorance cases—deliberate, purposeful avoidance of knowledge—adds a little more culpability. But it still does not ensure that the actor is as callous as one who knows he is doing wrong, because one could deliberately avoid knowledge for some quite innocent reason.²⁶⁷ Thus, something more is still necessary.

A criminally related “bad” purpose is a suitable additional inculpatory factor. This factor has naturally emerged as the doctrine of wilful ignorance has evolved. Two such evil purposes have arisen in wilful ignorance cases: an intent to permit or to foster someone else’s illegal act (in connivance cases)²⁶⁸ and an intent to act in what appears to be a criminal fashion while deliberately immunizing oneself from criminal responsibility.²⁶⁹ Both evidence a high level of criminal callousness. The first of these two bad purposes is not suggested for an overall definition. It is found in the early connivance cases, in which the required mens rea is usually something less culpable than knowledge,²⁷⁰ and it does not arise with any regularity in modern wilful ignorance case law. In addition, requiring the second evil purpose might insure that the actor was more culpable than would requiring the first, because the second purpose, in most instances, seems more malevolent than the first. It involves furthering one’s own criminal act, rather than simply tolerating someone else’s.²⁷¹ More importantly, it implies that the individual actually intends

Model Penal Code formulation because it is not clear that it requires the defendant’s subjective awareness of the information. It implies that one is charged with being aware of what one should have seen, not necessarily what one actually did see. *See supra* note 168.

264. *See supra* text accompanying notes 99-116.

265. *See supra* text accompanying notes 181-87.

266. For case examples, *see supra* notes 259-61.

267. *See supra* subpart IV(C).

268. *See supra* notes 207-12 and accompanying text.

269. *See supra* notes 247-54 and accompanying text.

270. *See supra* notes 29-31 and accompanying text.

271. Concededly, it may be more depraved in some circumstances to foster or tolerate someone

to commit a crime, even though he may not be sure that he is committing a crime. If someone deliberately avoids attaining knowledge specifically to be able to set up a deniability defense to a crime,²⁷² he may not know for certain that he has something criminal to deny, but we know for certain that he has considered the criminal consequences of his action and is willing to act nonetheless. This suggests that the last enhanced culpability factor—a purpose to avoid criminal sanction by obviating an element of the crime—should be part of any definition of wilful ignorance used as a wholesale knowledge equivalent, that is, to satisfy the mens rea for all crimes that otherwise require knowledge.

This last factor is vital if we want to punish people who may not know, but who are about as callous as those who know. Having good reason to believe that some fact exists that makes what one is doing wrong (the first suggested factor) and being on the verge of believing (the second suggested factor) do not make a person quite as heartless as someone who actually does believe in the truth or existence of the fact that indicates he is acting wrongly. Nor does purposefully avoiding finding out the truth seem as evil, because it may be innocently motivated. It is the last element—a corrupt motive in not knowing—that is most indicative of callousness and of criminality. When all four factors are present, the individual is on the verge of knowing and deliberately avoids knowing for some sinister purpose connected with promoting criminal activity and avoiding criminal liability. Someone who commits a criminal act with all these factors present is probably as insensitive and indifferent to the criminality of his act as someone who actually believes he is acting criminally.²⁷³

else's crime than to commit a crime oneself. In the former case, the actor might be contributing to the corruption of another, which involves a certain added evil. For other reasons discussed in the text, however, the obstruction of justice factor is preferable.

272. A notable example of this notion of a deniability defense arose in connection with President Ronald Reagan and the Iran-Contra arms scandal in 1987. Admiral John Poindexter, Reagan's National Security Advisor during the relevant period, testified before Congress that he never told the President about the covert diversion of Iranian arms profits to Nicaraguan rebels, specifically in order to establish a "plausible deniability" defense for the President should the scheme become public. *Iran-Contra Hearings: A Mixed Blessing for Reagan*, N.Y. TIMES, July 16, 1987, at 1. If Poindexter's account is accurate, it actually would not illustrate wilful ignorance. As "plausible deniability" was defined by Richard Helms, a former Director of Central Intelligence, and as it was apparently used by Poindexter, it meant that covert operations were decided upon by national security staff without actually involving the President at all, so that the President could honestly maintain that he knew nothing. *See id.* If President Reagan truly knew *nothing*, presumably he would not even have been aware of a probability or a risk that the arms diversion was occurring, so he would not fit any definition of wilful ignorance. Moreover, according to Poindexter, the President's aides deliberately kept him in ignorance; therefore, his non-knowing state would not have been the result of his *own* wilful or deliberate effort to remain unaware.

273. Empirically, it is probably true that the more aware one is of a fact that makes his conduct criminal, and the more one therefore ignores when acting (that is, the more one fits the Code-based

With all four suggested factors in evidence, it seems reasonable to conclude that the wilfully ignorant actor will usually be about as malevolent as the knowing actor. Therefore, if wilful ignorance is defined in the suggested manner, it might be proper to apply the same criminal consequences to a wilfully ignorant act as to a knowing act. Hence, this Article recommends equating its definition,²⁷⁴ rather than the presently used definitions, of wilful ignorance with knowledge.

VI. A Case Study: Drug Importation

This Part illustrates how the issues considered in the previous parts apply in the case of drug importation, a crime for which knowledge is required²⁷⁵ and for which wilful ignorance instructions are frequently used.²⁷⁶ The first subpart demonstrates that present formulations of

definition of wilful ignorance), the greater the likelihood that the person is ignoring the information in a deliberate or purposeful way and for an obstructionist aim. The more pieces of the puzzle one possesses—or the more certain one is of the existence of the fact in question—the more probable it is that one is more culpable, perhaps even as culpable as someone who was wilfully ignorant under the suggested definition. If we could accurately describe the level of risk of which one must be aware to be significantly more culpable than a reckless person and as culpable as a knowing person, yet not be so certain as to actually know, then it might be legitimate to equate a Code-like form of wilful ignorance with knowledge and to forget about the added culpability distinctions that the suggested definition supplies.

Whatever the propriety of the equation might be, the Model Penal Code has not achieved it because its “high probability” language lacks sufficient precision. As a result, it generalizes. That is, it assumes that enough of the people in the defined group will be acting at a level of culpability like that of the knowing to justify blanket treatment of the group as comparably culpable to the knowing. Rather than generalize in this way, and struggle with fine linguistic distinctions (like that between “substantial” and “high” probability) that jurors may not even comprehend, *see infra* note 298 and accompanying text, it seems more reasonable to expressly add the elements contained in the suggested definition of wilful ignorance, which more directly indicate the actor’s culpability.

274. *See supra* text accompanying notes 260-61; *infra* Part VII.

275. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1010, 21 U.S.C. § 960(a)(1) (1988); *see also* United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir.) (“Although knowledge that the substance imported is a particular narcotic need not be proven, [the statute] requires knowledge that such substance is a controlled substance.”), *cert. denied*, 439 U.S. 935 (1978); United States v. Jewell, 532 F.2d 697, 698 (9th Cir.) (en banc) (“[A] defendant who has knowledge that he possesses a controlled substance may have the state of mind necessary for conviction even if he does not know which controlled substance he possesses.”), *cert. denied*, 426 U.S. 951 (1976); *accord* United States v. Christmann, 298 F.2d 651 (2d Cir. 1962) (holding that a jury instruction required reversal because it “permitted a finding of guilt even if the jury believed appellant’s testimony that she thought the substance she was wrongfully importing was essence of perfume and did not know or have any reason to believe it was a narcotic drug”).

276. *See* Chesnut, *supra* note 8, at 49 (noting that wilful ignorance instructions are increasingly important in federal prosecution of smuggled drugs because of evidence that deliberate avoidance is an established practice in the illegal drug business). For examples of the numerous drug importation cases reviewing the wilful ignorance instruction, *see* United States v. Feroz, 848 F.2d 359, 361 (2d Cir. 1988) (holding not to be plain error an instruction that lacked a statement that the defendant’s knowledge would be established if he were aware of a high probability of the drug’s existence and that it would not be established if he had an “actual belief” that it did not exist); United States v. Alvarado, 838 F.2d 311, 316-17 (9th Cir.) (holding that the district court erred in giving “the Jewell instruction”

wilful ignorance charges do not equip jurors to distinguish the doctrine from recklessness, which is not a basis for conviction under the importation statute. The second subpart discusses culpability. It examines the nature of the behavior that the legislature might wish to punish in the importation context, whether current definitions of wilful ignorance identify that behavior, and whether the alternative formulation suggested in Part V describes behavior that more closely approximates the level of culpability at which the statute was aimed.

A. *Jury Misunderstanding*

For purposes of discussion, *United States v. Jewell*,²⁷⁷ a well-known wilful ignorance decision, is used. Jewell was convicted of importing 110 pounds of marijuana²⁷⁸ that had been concealed in a secret compartment between the trunk and rear seat of a car he drove from Mexico to the United States.²⁷⁹ The crime required knowledge of the presence of a controlled substance,²⁸⁰ and Jewell testified that he did not know marijuana was in the car.²⁸¹ The story Jewell related to the jury was that a week before his arrest he sold his car for \$100 to obtain money to "have a good time."²⁸² He then rented a car for about the same amount of money and drove to Mexico with a friend.²⁸³ A stranger named "Ray" approached them in a bar in Tijuana offering to sell them marijuana.²⁸⁴ When they declined, Ray asked if they wanted to drive a car back to Los Angeles for \$100.²⁸⁵ Jewell's friend testified that he "wanted no part of driving the vehicle" because it "didn't sound right" to him, but Jewell accepted the offer.²⁸⁶ Ray instructed Jewell to leave the

but that it was harmless error), *cert. denied*, 487 U.S. 1222 (1988); *United States v. Caminos*, 770 F.2d 361 (3d Cir. 1985) (holding no error in the judges' wilful ignorance charge because it "did not suggest a 'reasonableness' standard," repeatedly warned that stupidity or negligence are not sufficient to show the wilful ignorance required, and focused on the defendant's subjective awareness); *United States v. Cano*, 702 F.2d 370, 371-72 (2d Cir. 1983) (holding the charge to be "sufficient to inform [the jury] not to infer knowledge from anything less than a deliberate disregard of a high probability"); *United States v. Suttiswad*, 696 F.2d 645, 651 (9th Cir. 1982) (holding that the *Jewell* instruction was properly given).

277. 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

278. He was also convicted of possession of a controlled substance with the intent to distribute it. *Id.* at 698.

279. *Id.*

280. It was not necessary that the defendant know which controlled substance he was importing. *Id.*

281. *Id.*

282. *Id.* at 699 n.1.

283. *Id.* Neither Jewell nor his friend could "adequately" account for their whereabouts during the 11 hours it took them to get from Los Angeles to Mexico. *Id.*

284. *Id.*

285. *Id.* at nn.1-2.

286. *Id.* at n.2.

car at the address on the registration with the keys in the ashtray. The individual living at that address testified at trial that he had sold the car a year earlier.²⁸⁷

A Drug Enforcement Administration agent testified that Jewell admitted he thought there was probably something illegal in the vehicle, but he checked it over by looking in the glove box, under the front seat, and in the trunk before driving the car.²⁸⁸ The agent said Jewell stated that because he did not find anything, he assumed the people at the border would not find anything either. A Customs agent testified that when he opened the trunk and saw a partition, he asked Jewell when he had put it in, and Jewell responded that it was in the car when he got it. When asked at trial whether he had seen the special compartment upon opening the trunk, Jewell responded that he saw "a void there," but he did not know what it was, and he did not investigate further.²⁸⁹

There are several ways of looking at these facts. A jury could conclude that Jewell actually knew he was importing marijuana. Portions of Jewell's story do not make much sense.²⁹⁰ These portions could cause a jury to question his veracity generally and thus disbelieve his denial of positive knowledge. In fact, a jury might conclude that Jewell planned to import marijuana and went down to Mexico specifically for the purpose of obtaining drugs to bring across the border.²⁹¹

In a similar vein, a jury could surmise that Jewell "connived" in the importation, in at least two different senses of the term. He may have connived in the sense of pretending ignorance, that is, he may have known of the drugs in the trunk, but pretended not to know. Or, he may have connived in the sense that he thought that the trunk probably contained marijuana, and he secretly cooperated in Ray's effort to bring drugs across the border by driving the car without checking too closely.

On the other hand, a jury might believe Jewell's account, with or without believing the agents' rendition of Jewell's remarks. The jury could find that Jewell did not know he was importing a controlled substance. Even if the circumstances seemed very suspicious, the jury could decide

287. *Id.* at n.1.

288. *Id.* at n.2.

289. *Id.*

290. For example, Jewell claimed he sold his car for \$100 to get money to have fun, but he then rented another car shortly thereafter for about the same amount of money. *See id.* at 699 n.1. Neither he nor his companion could account for their whereabouts during the 11 hours it took them to get from Los Angeles to Tijuana. In addition, according to Jewell's account, a total stranger entrusted him with a car and a load of marijuana, valued at trial at over \$6000, and supposedly instructed him to leave the valuably loaded car with the keys in the ashtray. *Id.* at 698-99 & nn.1-2. Moreover, the resident at the address where he was supposed to leave the automobile claimed to have sold it a year earlier and not to have seen it since. *Id.* at 699 n.1.

291. *Id.*

that Jewell was foolish, stupid, careless, negligent, or reckless for not checking further. It could reason that he should have known there were drugs in the car, that he was aware only of a possibility that the car contained drugs, that he was aware of a substantial and unjustifiable risk that the car contained drugs, that he was aware of a high probability that the trunk compartment contained drugs, or even that he was aware of a practical certainty that he was carrying marijuana. Whatever level of awareness the jury found, it could find that, having checked somewhat, Jewell nevertheless believed that the car did not contain drugs, did not form a belief one way or the other, or still suspected the car might contain drugs but did not know.

In evaluating these scenarios, it is important to keep in mind that Congress has determined that only purposefully or knowingly importing a controlled substance is punishable as a crime,²⁹² and not negligently or recklessly importing drugs. Thus, using Model Penal Code definitions, it is not enough for conviction that a person should have been aware of a substantial and unjustifiable risk that he was carrying drugs across the border (Code-based negligence),²⁹³ or that he was personally aware of and consciously disregarded such a substantial risk (Code-based recklessness).²⁹⁴ The person must know he is importing drugs to be convicted under the importation statute.

The different definitions of wilful ignorance affect how a jury might view the behavior involved in the case, as well as how it might apply the legal distinctions made in jury instructions. Suppose a jury is instructed on the offense of drug importation given the facts in *Jewell* and using the Model Penal Code definitions of knowledge, recklessness, and wilful ignorance. The jury would be instructed that the crime can be committed by a person who carries a controlled substance across the border "knowingly," but not by one who carries the substance "recklessly." In this regard, Jewell would have carried drugs knowingly if he were aware that he had drugs in his possession and that he was bringing them into the United States. He also would have carried drugs knowingly if he were aware of a high probability that the car contained drugs when he drove it into the United States, unless he actually believed that it did not.²⁹⁵ However,

292. See Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1010, 21 U.S.C. § 960(a)(1) (1988) ("Any person who . . . knowingly or intentionally imports or exports a controlled substance . . . shall be punished as provided . . .").

293. MODEL PENAL CODE § 2.02(2)(d).

294. *Id.* § 2.02(2)(c).

295. In the case, the trial court instructed the jury that the government must prove beyond a reasonable doubt that Jewell "knowingly" brought the marijuana into the United States. It added that this burden could be met by proving that

if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was

Jewell would have carried drugs recklessly, and would not be guilty, if he consciously disregarded a substantial and unjustifiable risk that the car contained drugs as he drove across the border.

It is difficult to comprehend how a jury could understand the subtle distinction between the charge that recklessness will not suffice and the charge that wilful ignorance will.²⁹⁶ Suppose the jury found that Jewell thought there probably was marijuana in the car. Can we expect the average juror to determine successfully that Jewell consciously disregarded a substantial risk that there was marijuana, but that he was not aware that the risk was highly probable?²⁹⁷ Indeed, the very same combination of evidence that would convince a jury of laymen that the risk Jewell was aware of was substantial and unjustifiable would undoubtedly also convince it that he was aware of a high probability that drugs were in the car. The danger here is that the reckless will be convicted as readily as the knowing, and that result is not what either the legislature or the Model Penal Code²⁹⁸ intended.

solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.

Jewell, 532 F.2d at 700. This particular charge stresses one of the traditional elements of wilful blindness—deliberate, purposeful avoidance of the true facts. The dissent, authored by then-Circuit Judge Anthony M. Kennedy, criticizes the absence of the high probability and balancing language contained in the Model Penal Code. *See id.* at 706-07 (Kennedy, J., dissenting).

296. In reality, the problem of mistakenly ensnaring the reckless is significantly greater than in this illustration. In most actual cases, the jury would be charged that either actual knowledge or wilful ignorance, as defined in the example, would have to be found for conviction, but it would not be told that recklessness (which would also not be defined) would not suffice; jurors are usually charged only on what the elements of the crime are—not on what they are not. Thus, even if some jurors were able to comprehend the distinction between these definitions of wilful ignorance and recklessness, so that they might find defendants who were wilfully ignorant guilty but absolve defendants who were reckless, they would not know that the latter (the reckless) are to be excused. Also, on occasions when jurors are told that recklessness is not enough, they often are not told what recklessness is. In these situations, jurors may think that recklessness is something quite different from, and less culpable than, the construct we usually call criminal recklessness. Hence, the danger of wrongfully convicting the reckless is greatly increased in actual court settings.

297. It might be easier for the jury to distinguish between Model Penal Code wilful ignorance and Model Penal Code recklessness if it is told that Code-based recklessness does not require subjective awareness of the level of risk involved. *See supra* note 130. However, if Code-based recklessness requires at least awareness of factors that make the risk substantial and unjustifiable, it would probably still be difficult for the jury to make the type of distinction required. In any event, however the Code defines recklessness, it would still be the case that if Jewell were aware of a substantial probability that the car contained drugs he would be reckless, and he would not be guilty, while if he were aware of a high probability of that fact he would be wilfully ignorant, and he would be guilty. Therefore it is still unlikely that the jury would be able to distinguish wilfully ignorant importers from the broad range of reckless importers.

298. *See* MODEL PENAL CODE § 2.02 cmt. 9 n.42 (indicating that the drafters of the Code attempted to distinguish wilful ignorance from recklessness).

If the jury were charged using this Article's suggested wilful ignorance factors, it might be instructed that the defendant could be found guilty if he knew he carried drugs across the border, or if he was aware of good evidence that the car contained marijuana and almost believed that it did but did not know only because he deliberately avoided finding out in order to be able to deny actual knowledge in the event he was apprehended. In this example, the specially culpable aspects of the behavior are explicitly identified for the jurors, making it easier for them to understand the difference between the suspicious and heedless reckless individual and the suspicious and heedless wilfully ignorant individual.

B. Culpability in Context

The importation statute does not explain why at least knowledge is legislatively required for conviction. In part this requirement probably stems from the view that one who actually knows he is importing drugs is more morally reprehensible and dangerous than one who takes a substantial risk that he is. He is more callous to the societal harm that the importation of drugs will cause to the public and more deliberately criminal, thus making him more deserving of punishment. In addition, he is also more likely to pose a greater danger to society. Because he is more deliberately criminal, he is more of a social menace. A knowing drug importer apparently is willing to unleash a dangerous substance onto our streets, while a reckless importer might not be if he were more certain of what he was doing.

What about the wilfully ignorant importer? If wilful ignorance embodies the Code-based definition, the issue is whether Congress intended to or should punish someone who is aware of a high probability that he is importing drugs when Congress has already decided not to punish someone who is aware of and consciously disregards a substantial risk that he is importing drugs. It is certainly possible that Congress meant to ensnare the former and not the latter, but it is not likely. Theoretically, the legislature could find that those aware of a high probability they are bringing drugs into the country as compared with those aware of a substantial probability they are importing drugs are morally reprehensible at some slightly elevated level, and pose a slightly increased danger of engaging in criminal behavior. As a practical matter, however, it seems difficult to justify this conclusion. The difference in blameworthiness and danger of the two is simply too minimal to imply a legislative intent to treat these groups differently, or to warrant such treatment through future legislative enactment.

The picture changes somewhat when this Article's suggested formulation of wilful ignorance is used. Compare the Code's wilfully

ignorant actor to someone who not only is aware of the probability²⁹⁹ that a car he is about to drive into the United States has marijuana in the trunk, but also almost believes that marijuana is present, deliberately disregards his near-belief, and, in addition, purposely avoids searching the car inore thoroughly to confirm or to refute his suspicion because he wants to be able to say to the border guard, if drugs are discovered, "You can't hold me criminally responsible for this because I didn't *know* there were drugs." This wilfully ignorant actor is considerably more culpable than the Model Penal Code's wilfully ignorant importer because his action involves a significantly higher level of intent. He is more consciously and purposefully criminal. He not only does not care whether or not he happens to be carrying drugs in the car, he also takes deliberate, calculated steps not to find out in order to use the technical requirements of the criminal law to cheat the administration of justice.³⁰⁰ In other words, he is more clearly

299. To be wilfully ignorant using the suggested requirements, the probability one is aware of need not necessarily be "high," as the Model Penal Code requires. Many, if not most, older formulations of wilful ignorance did not specify any required level of probability or of awareness. This is probably because the traditional elements in wilful ignorance definitions, such as purposeful avoidance, themselves raised the level of culpability of the behavior involved. Because these traditional factors have been discarded or are unstressed in the Code's formulation, it has become necessary to substitute other language to raise the culpability level of the behavior. Hence, Code-type formulations specify a higher level of risk of which one must be aware as a substitute for other culpability-enhancing elements. As discussed, *supra* note 273, this approach is essentially a less perfect means of doing what this Article's suggested definition does with different, more pointedly relevant, language.

It may not be advisable to specify a particularly high level of risk of which one must be aware in definitions of wilful ignorance, for the same reasons as some authorities argue that it is not advisable to specify a particular level of risk for reckless behavior. See *supra* notes 124-30 and accompanying text. Even with a very low probability of risk, given other factors, such as grave potential danger or a complete absence of social utility for the behavior involved, an action can be reckless. Likewise, even if someone is aware of only a possibility or a low level of probability of criminality, we may still want to hold the individual liable if he wilfully ignores positive knowledge.

For example, suppose a drug importer assembles 50 foreign laborers and tells them that, for \$500 each, they will all be sent into the United States with a package. Forty-nine of the packages, he instructs, will be filled with talcum powder, and one will conceal a large shipment of cocaine. Suppose all accept, and each deliberately refuses to check his individual package because he wants to be able to participate and partake of the \$500 but also wants, in the event of discovery, to be able honestly to say he did not know he was carrying drugs. The one with the cocaine would not, under the Model Penal Code formulation, either know or be aware of a "high" probability that he was carrying cocaine. Therefore, he could not be convicted of drug importation. However, given the complete absence of social utility for his conduct in carrying the package into the United States, and the potentially grave danger that a large amount of cocaine represents, we might well want to be able to hold him criminally responsible. Under the suggested definition, when no particular level of risk is required, he could still be wilfully ignorant and therefore culpable, since he would have had very good information that his package might contain cocaine. Yet, even under the suggested formulation he might not be guilty, because he might not almost believe he was carrying cocaine. If such an individual could not be found criminally responsible for the crime of importation under either definition of wilful ignorance, he might be found guilty nevertheless of conspiracy to import cocaine. See *infra* note 308.

300. See *United States v. Nicholson*, 677 F.2d 706, 707-08 (9th Cir. 1982) (quoting accused co-

consciously amenable to breaking the law than the Model Penal Code's wilfully ignorant importer.

For example, suppose the jury found the following facts: (1) Jewell was aware of a high probability there was marijuana in the car, but he did not know it was there; (2) he did not particularly believe that there were or were not drugs in the car; (3) he conducted a reasonable though not thorough search of the car and did not find drugs; and (4) he deliberately disregarded his awareness of the probability of the presence of drugs because he was anxious to earn \$100 for a trip he had to make anyway. On these facts, Jewell would not be guilty under the suggested wilful ignorance theory. He did not deliberately avoid finding out whether there were drugs in the car in order to be able to deny knowledge of the presence of drugs if challenged by border agents. On the other hand, he would be guilty of importation under a Code-based³⁰¹ or wilfulness-based definition³⁰² of wilful ignorance.

In contrast, suppose the jury found that Jewell met the suggested definition of wilful ignorance. In that case, the jury would have to have found that he deliberately decided not to ask about the presence of drugs or to search adequately—steps that would have revealed the presence of marijuana—because he thought this avoidance of knowledge would enable him to avoid liability in the event he was caught.³⁰³ If these were the findings, Jewell would have acted in a much more culpable fashion than if the previously described facts had been found. He consciously would have considered the probability that there were drugs in the car and that he might have to answer to the authorities for bringing them across the border. Having contemplated this scenario, which includes contemplation of his participation in a crime, he decided not only to go ahead and drive

conspirators in a drug case as saying that it is common practice in the illegal drug business not to ask questions because nobody wants to know the answers; thus, the defendant did not ask how his \$20,000 investment was to be used, even though he knew his cohorts had been in the business of smuggling marijuana).

301. As for a Code-based definition, he was aware of a high probability of the presence of marijuana, and he did not affirmatively believe that the car did not contain marijuana. It seems somewhat strange that Jewell should be guilty of importation based on these findings when he could not be guilty of reckless importation because reckless importation is not criminal. His culpability, given these facts, is closely akin to that of a reckless importer, a person who did all the same things but was aware of only a substantial and unjustifiable probability that the car contained drugs rather than a high probability. At the same time, his culpability is much less like that of someone who actually knew he was importing drugs.

302. He deliberately avoided positive knowledge of whether there were drugs in the car.

303. The jury could have reached this conclusion if it credited the Drug Enforcement Administration agent's testimony that Jewell said he did not expect the border officials to discover marijuana because he himself did not see it in his search of the more obvious compartments. *See Jewell*, 532 F.2d at 699.

the car into the United States, but also deliberately to avoid confirming his near-belief that he was committing a criminal act so that he could escape the anticipated punishment. In this case, he would essentially have acted in as morally reprehensible a fashion as someone who actually knew there were drugs in the trunk.

The analysis thus far examines the effect of different definitions of wilful ignorance in a particular case. Even if the suggested definition of wilful ignorance is not adopted as a wholesale knowledge equivalent, it nevertheless might be advisable to lower the mens rea for the crime of drug importation to a level that would include less culpable forms of wilful ignorance, such as those commonly in use. In other words, the issue of whether any type of wilful ignorance ought to be a culpable mental state for the particular offense of drug importation, a crime that requires a mens rea of knowledge and does not involve a special duty to know or to inquire, must still be addressed.

The apparent reason for the widespread use of wilful ignorance charges in drug importation cases may well supply the rationale for a legislative determination that wilful ignorance, even under some currently used descriptions, should be sufficient for conviction of this particular crime. The difficulty of detecting dangerous drugs, many of which are relatively small and easily concealed even from the person who carries them,³⁰⁴ militates in favor of considering even a lower level of wilful ignorance as a guilty mens rea for this crime. The ease with which a drug courier may avoid positive knowledge of the nature of what he is carrying³⁰⁵ makes it possible for persons who are very much a part of a

304. See *United States v. Del Aguila-Reyes*, 722 F.2d 155, 157 (5th Cir. 1983) (noting that, in a prosecution for illegal importation of cocaine found in the car driven by the defendant, "[b]ecause the cocaine was located in a compartment which was not visible or readily accessible to him, his possessing and driving a vehicle which contained contraband cannot, standing alone . . . suffice to prove guilty knowledge"); see also *Jewell*, 532 F.2d at 703 (arguing that the federal drug importation statute must encompass wilful ignorance toward what one carries into the country because drug traffickers would otherwise "make the most" of a deliberate ignorance defense, as evidenced by "the number of appellate decisions reflecting conscious avoidance of positive knowledge of the presence of contraband—in the car driven by the defendant or in which he is a passenger, in the suitcase or package he carries, [and] in the parcel concealed in his clothing").

305. "It is probable that many who performed the transportation function, essential to the drug traffic, can truthfully testify that they have no *positive* knowledge of the load they carry." *Jewell*, 532 F.2d at 703. Drug traffickers can often deliberately avoid positive knowledge of what it is they are storing, transporting, or selling by dealing with substances that are adequately wrapped or concealed. See Robbins, *supra* note 1, at 200 (suggesting that because small quantities of drugs are available, they are easy to conceal); see also *United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982) (involving testimony from several co-conspirators that "'deliberate avoidance' was an established practice in the illegal drug business"). Even when actual knowledge exists, it is difficult to prove; one can easily claim to lack knowledge of the contents of an opaque package, or to believe a package containing drugs contains some other substance. It is these very difficulties of proof that most likely resulted in the widespread use of wilful ignorance instructions to satisfy the knowledge requirement in drug cases.

criminal enterprise, and even those who are intentionally so, to avoid confirmation of their strongest suspicions and still to avoid the legal requirement of knowledge.³⁰⁶

Another way to decide whether some lesser form of wilful ignorance should be a culpable mens rea for drug importation is to articulate which drug importers we want to punish. We already sanction those who purposefully bring drugs into the country and those who, though they may not have any particular desire to import drugs, know they are carrying drugs across the border and nevertheless are callous enough to do so. At the same time, we are content to tolerate those who think it substantially probable they are smuggling drugs yet are willing to take that risk. Perhaps we also want to catch those who are not quite certain they are importing drugs but are significantly more certain than the reckless, for example, those who are "near certain." If this is the case, the solution would be to use "near certain" language in the importation statute and in jury instructions. Whatever the advisability of this resolution, it does not speak to wilful ignorance. It is simply a determination that something less than "knowledge" is an appropriate measure of mens rea for this crime.

With regard to wilful ignorance, we probably want to punish the scofflaw. Since we do not punish the reckless, we do not want the person who surmises that the car he is driving into the country for \$100 probably contains marijuana but decides, "What the heck, maybe it doesn't." Instead, we want the individual who surmises the car probably contains drugs and decides, "Although it would be easy to look behind that 'void' in the trunk to find out, if I don't check I can always say I didn't know there was any marijuana. That way I get my \$100 and, if I get caught, I'm still not responsible." We want to hold answerable the individual who would undoubtedly know that he was importing drugs if he had not taken

Wilful ignorance instructions ease the prosecutors' burden of proving actual knowledge and allow them to close the net around many more drug defendants. See Robbins, *supra* note 1, at 200; Comment, *supra* note 10, at 471.

306. The same might be true for many crimes for which knowledge is the minimum culpable mens rea. In the case of each such crime, a potential defendant could participate, even with the intention of aiding a criminal enterprise, yet deliberately avoid positive knowledge of some crucial fact, knowledge of which is required for conviction. If there is no reason to differentiate between wilful ignorance in drug importation cases and wilful ignorance in a case involving any other crime requiring knowledge, then it should be a guilty mens rea state for all or for none of these offenses. One possible reason for Congress to distinguish drug importation, however, may be the devastating effect that drugs are currently thought to have on our society. See Comprehensive Drug Abuse Prevention and Control Act of 1970, § 101, 21 U.S.C. § 801 (1988) ("The Congress makes the following findings and declarations: . . . The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."). If the gravity of the problem posed by a particular crime, in this case drug importation, is perceived as more serious than in the case of other crimes, it may be advisable to consider a broader level of culpability.

deliberate, affirmative steps to avoid finding out, and who probably would commit the crime even if he did know. Requiring a purpose to obstruct justice can help accomplish this.³⁰⁷ In short, one way of catching those we probably want to hold responsible for drug importation is to bring those who fit the suggested wilful ignorance criteria within the ambit of the statute.³⁰⁸

If the legislature decides that wilful ignorance is a sufficiently culpable mens rea for drug importation, it would still have to determine what definition of wilful ignorance most closely aligns with the group of behavior culpable enough to be covered. In this regard it is important once again to keep in mind the difference between the wilfully ignorant and the reckless. Only where the wilfully ignorant are significantly more culpable than the reckless, even given the gravity of the drug problem, would there likely be a particular reason to catch the wilfully ignorant but to let the

307. It may be that limiting the reach of the statute to those with an obstructionist purpose in avoiding knowledge would prove too restrictive. As a practical matter, it could be too difficult to establish obstructionist motivation. Jurors could get the impression that some sort of explicit or affirmative evidence of a purpose to "trick the system" is required, such as Jewell's statement that he did not think the border guards would find drugs because his perusal of the obvious storage spaces did not reveal any. This type of evidence will rarely be present. In fact, however, mens rea factors are usually established circumstantially, by inference from facts that often do not directly or explicitly address the defendant's state of mind. See *supra* note 20 and accompanying text. It is not more unreasonable to require that a jury surmise from this type of evidence a desire to flaunt the law through one's deliberate ignorance, than to require that a jury surmise from such evidence a purpose to import drugs.

308. One argument against getting enmeshed in the wilful ignorance problem when the behavior to be punished is more intentional or deliberate, as it would be under the suggested formulation, is that in such cases it will sometimes be possible to convict the individual on a conspiracy theory, such as conspiracy to import drugs. For example, in the 50-foreign-laborers hypothetical posed *supra* note 299, each of the couriers would be guilty of conspiracy to import cocaine, even though each was aware of only a 1-in-50 chance that his package contained the drugs. Conspiracy is possible only when more than one person is involved, but more than one person will usually be involved when the actual drug importer does not know what is in the package or vehicle he brings across the border, since a second person would have had to have put the drugs in the package or vehicle.

When conspiracy may be used to punish the culpable individual, it is not necessary to employ wilful ignorance as the criminal hook. The problem with conspiracy, however, is that it also requires knowledge. See 21 U.S.C. § 846 (1988) ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both."), construed in *United States v. Hitow*, 889 F.2d 1573, 1577 (6th Cir. 1989) (explaining that conspiracy requires that "a defendant know of the object of the conspiracy, associate himself with it, and knowingly contribute his efforts in its furtherance"). The courier would still have to have conspired "knowingly" to import drugs, meaning he would have to know that the nature and object of the conspiracy was to bring drugs into the United States. In the laborers example, this requirement is not a problem. Each of the 50 co-conspirators would know that the purpose of the conspiracy was to import drugs, and that the nature of the plan was that one of the 50 couriers would carry the package of cocaine. Each could, therefore, be found guilty of conspiracy to import a controlled substance.

For a discussion of the use of wilful ignorance in conspiracy cases, see Christine L. Chinni, Note, *Whose Head Is in the Sand? Problems With the Use of the Ostrich Instruction in Conspiracy Cases*, 13 W. NEW ENG. L. REV. 35 (1991).

reckless go. The wilfully ignorant will not usually be significantly more culpable than the reckless unless wilful ignorance is defined in a more culpable fashion than it currently is. For all the foregoing reasons, one possible way to achieve a more appropriate result is to redefine wilful ignorance along the lines this Article suggests.

VII. Conclusion

Use of the doctrine of wilful ignorance in criminal cases is in need of reform. Although wilful ignorance is usually employed to satisfy a statutory mens rea of knowledge, the most prevalent definitions of the doctrine describe a state of mind that is significantly different from what we generally understand to be knowledge, and that is not as culpable as knowledge in all or most circumstances. To address this problem, some formulation of wilful ignorance should be derived that more closely matches the culpability of knowledge than those presently in use. Such a formulation could then be adopted for crimes for which knowledge is the statutorily required mens rea. A suggested definition of a more culpable form of wilful ignorance follows: A person is wilfully ignorant of a material fact if the person (1) is aware of very good information indicating that the fact exists; (2) almost believes the fact exists; and (3) deliberately avoids learning whether the fact exists (4) with a conscious purpose to avoid the criminal liability that would result if he or she actually knew the fact. This particular formulation of wilful ignorance describes a state of mind that is about as morally reprehensible as knowledge and that identifies more closely than currently used formulations the behavior that society wants to punish under the doctrine of wilful ignorance.

